

Nos. 24-2044, 24-4045

***In the United States Court of Appeals for the Fourth Circuit***

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REPUBLICAN NATIONAL COMMITTEE; NORTH CAROLINA REPUBLICAN PARTY,  
*Plaintiffs-Appellees*

v.

NORTH CAROLINA STATE BOARD OF ELECTIONS; KAREN BRINSON BELL, IN HER  
OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE NORTH CAROLINA STATE  
BOARD OF ELECTIONS; ALAN HIRSCH, IN HIS OFFICIAL CAPACITY AS CHAR OF THE  
NORTH CAROLINA STATE BOARD OF ELECTIONS; JEFF CARMON, IN HIS OFFICIAL  
CAPACITY AS SECRETARY OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS;  
STACY EGGERS, IV, IN HIS OFFICIAL CAPACITY AS MEMBER OF THE NORTH  
CAROLINA STATE BOARD OF ELECTIONS; KEVIN N. LEWIS, IN HIS OFFICIAL  
CAPACITY AS MEMBER OF THE NORTH CAROLINA STATE BOARD OF ELECTIONS;  
SIOBHAN O'DUFFY MILLEN, IN HER OFFICIAL CAPACITY AS MEMBER OF THE  
NORTH CAROLINA STATE BOARD OF ELECTIONS,  
*Defendants-Appellants*

DEMOCRATIC NATIONAL COMMITTEE,  
*Intervenor / Defendant-  
Appellant*

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From the United States District Court  
for the Eastern District of North Carolina  
The Honorable Richard E. Myers II (No. 5:24-CV-00547)

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**OPPOSITION OF PLAINTIFFS-APPELLEES TO EMERGENCY  
MOTIONS TO STAY**

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## **INTRODUCTION**

Defendants and Intervenor-Defendants Motions are procedurally defective run-arounds of the Federal Rules of Appellate Procedure. In an attempt to delay remand to state court, Defendants and Intervenor-Defendant ignore that the District Court already granted a stay at their request. Unhappy with the amount of time they asked for, they run to this Court seeking improper relief. For the reasons set forth herein, both Motions should be denied.

## **BACKGROUND**

Plaintiffs filed their Complaint against the North Carolina State Board of Elections (“NCSBE”) in Wake County Superior Court on August 23, 2024. Doc. 6 (“Compl.”) at 26. Plaintiffs allege that the NCSBE, its members, and its executive director (collectively, “Defendants”) violated state law by allowing potentially ineligible applicants to register to vote without collecting the required identification information under state law in the first instance. N.C.G.S. §163-82.4(a) (requiring county boards the collection of certain information in a voter application form). Compl. ¶3. It is undisputed that NCSBE’s previous voter registration form made optional the fields

on the form where applicants are required under federal law to provide a driver's license number or the last 4 digits of their social security number, *see* 52 U.S.C. §21083(a)(5)(A), and that this omission resulted in the registration of approximately 225,000 applicants who did not supply information required by HAVA. *Id.* ¶¶42-43.

Count One—now dismissed—sought a writ of mandamus to address an alleged violation of N.C.G.S. §163-82.11(c) for failing to collect the required voter information in the first instance and, as a result, failing to maintain North Carolina's voter rolls in compliance with HAVA. *Id.* ¶¶77-88. Count Two—the subject of this appeal—seeks a permanent injunction to stop the NCSBE from further violating Plaintiffs' constitutional rights under Article I, Sec. 19 of the North Carolina Constitution by failing to collect all required identification information under state law. *Id.* ¶¶90-92. Recognizing the urgency of the issue, Plaintiffs requested “a court-approved plan to be completed no later than September 6” that would identify and remove ineligible registrants or, in the alternative, require voters who did not provide HAVA identification in their application to cast a provisional ballot *Id.* at Prayer for Relief ¶2.

After Defendants accepted service on August 27, Plaintiffs sought expedited discovery given the exigencies of the matter on August 29, 2024. Shortly thereafter, August 30, 2024, the Democratic National Committee (“DNC” or “Intervenor-Defendant”) moved to intervene as defendants. Doc. 6 at 49.

In the eleventh hour, on September 23, 2024, Defendants removed to federal district court. Plaintiffs filed an emergency motion to remand to the superior court on October 1. Doc 6 p. 3. On October 17, the district court held a hearing on the motions and issued an opinion later that day. Doc. 6 p. 3.

The district court concluded that it had original federal jurisdiction over Count One under 28 U.S.C. §1331 as it raised a disputed and substantial issue of federal law, and supplemental jurisdiction over Count Two. Doc. 6 at 81. Accordingly, the court found removal was proper under 28 U.S.C. §1441(a). *Id.* The district court analyzed and rejected Defendants’ alternative theory for removal under 28 U.S.C. §1443(2), because “[n]either Section 20507(c)(2)(A) nor Section 1010(a)(2)(B) provide ‘for specific civil rights stated in terms of racial equality.’” Doc. 6 at 83 (quoting *State of Georgia v. Rachel*, 384

U.S. 780, 792 (1966)). Refuting the application of §1443(2) to these claims, the court specifically noted that “the party seeking removal must cite a civil rights statute that deals in terms [of] racial equality and make some showing that their refusal to act actually involves considerations of racial equality or discrimination.” Doc. 6 at 85-86 (citing *Davis v. Glanton*, 107 F.3d 1044, 1049 (3d Cir. 1997)). Because “Defendants’ refusal to act does not have anything to do with racial equality,” the court concluded that it only had subject matter jurisdiction pursuant to §§1331 and 1441(a). Doc. 6 at 86-87.

After determining it had original jurisdiction of Count One, the district court dismissed it with prejudice, concluding that Plaintiffs lacked a private right of action under federal or state law.<sup>1</sup> Doc. 6 at 87-

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<sup>1</sup> Plaintiffs maintain that this ruling was incorrect for several reasons including, the district court’s misclassification of the mandamus relief Plaintiffs sought in Count 1. The North Carolina Supreme Court has made clear that North Carolina law treats private mandamus actions differently than federal courts in *Committee to Elect Dan Forest v. Employees Political Action Committee*, 376 N.C. 558, 569, 853 S.E.2d 698, (2021) (discussing North Carolina’s incorporation of “the prerogative writ of mandamus” through the common law); N.C. Gen. Stat. §4-1 (“Common law declared to be in force”). Contrary to footnote 8 on page 42, *State v. Diaz-Thomas*, 382 N.C. 640, 652, 888 S.E.2d 368, 378 (2022) did not alter the right to common law civil mandamus standard in North Carolina trial courts. Instead, *State v. Diaz-Thomas*

91. As to Count Two, the court declined to exercise supplemental jurisdiction over the “novel” issue of state constitutional law: “[W]hether the State’s noncompliance with state and federal election law can give rise to state constitutional injury.” Doc. 6 at 43-44. Citing “compelling [federalism] reasons” the court further noted that declining supplemental jurisdiction was appropriate because “state courts should decide the scope and extent of state constitutional rights.” Doc. 6 at 43 (quotation marks omitted) (citing 28 U.S.C. §1367(c)(4); *Minnesota v. National Tea Co.*, 309 U.S. 551, 557 (1940)). The court then remanded the case to state court in order to “best promote the values of economy, convenience, fairness and comity.” Doc. 6 at 44 (citing *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 353 (1988)); *Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 617 (4th Cir. 2001)). At the NCSBE’s request, the

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is a criminal case involving an appellate court’s issuing of a writ of mandamus under Rule 22 of the North Carolina Rules of Appellate Procedure. Here, Plaintiffs sought a civil common law writ of mandamus in the trial court. This further speaks to the unique nature of the state law claims at issue here. *See infra* pp. 8-9.

court stayed remand until October 22 to allow for this appeal. *See* Oct. 17, 2024 Hrg. Tr. (“Ex. 1”) at 17:7-12<sup>2</sup>.

## **ARGUMENT**

The district court’s remand order should take immediate effect, and Defendants’ and Intervenor-Defendant’s Motions should be denied, for two reasons. First, both Motions are procedurally defective and not properly before this Court. And second, even if these motions were properly in front of the Court, a stay pending appeal is inappropriate under relevant precedent.

### **I. Defendants’ and Intervenor-Defendant’s Motions are Procedurally Defective and Not Properly Before the Court.**

As a threshold matter, Defendants’ and Intervenor-Defendant’s Motions fail to comply with the Rules of Appellate Procedure. Rule 8 of the Federal Appellate Rules governs motions for a stay pending appeal, providing that such motions “must ordinarily” be made “first in the district court.” Fed. R. App. P. 8(a)(1). While the Rule does contemplate the possibility of the motion being made to this Court, it is clear that

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<sup>2</sup> A true and accurate copy of the transcript from the October 17, 2024 hearing is attached hereto as **Exhibit 1**.



the motion must meet certain criteria; in particular, if a motion to stay pending appeal is made first to this Court, then the motion must:

“(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.”

*Id.* at 8(a)(2)(A)(i)(ii).

Neither Defendants nor Intervenor-Defendant meet this requirement. Instead, Defendants and Intervenor-Defendants improperly ask this Court to essentially amend the district court’s judgment, and grant an emergency stay where none was requested below. Neither party cites to controlling precedent for such an action. Moreover, under Federal Rule of Civil Procedure 52(b), a stay motion should have been made with the district court. No party made such a motion. Now, Defendants and Intervenor-Defendant ask this Court to cure these glaring omissions.

**a. Defendants Cannot Satisfy Rule 8’s Requirements.**

The district court’s order stayed enforcement of the remand until Tuesday, October 22, 2024. Doc. 6 at 44. This relief was specifically requested by Defendants so they could pursue an appeal if the district

court remanded the case. *See* Ex. 1 at 17:7-12 (“I would ask you to enter some sort of reasonable stay of that order to allow the State Board time to appeal, as the State Board has the right to do . . .”); *see also* Doc. 6 at 92 (“At yesterday’s hearing, the State Board Defendants asked the district court to ***briefly stay*** its remand order, so they could appeal any adverse decision regarding remand.”) (emphasis added). The district court heard Defendants’ requests and obliged. Yet Defendants now claim, without support, that they understood the district court’s order to direct them to seek further relief from this Court. Doc. 6 at 50, n. 1. Apart from the fact that such an understanding should have first been vetted with the district court through a proper motion to stay, this makes no sense.

Nor can Defendants show that moving for a stay in the district court would be impracticable. *See* Fed. R. App. P. 8(a)(2)(A)(i). In fact, the record clearly reflects that Defendants sought a stay and the district court granted one in the exact form which it was requested. *Compare* Ex. 1 at 17:7-12 *with* Doc. 6 at 92. Similarly, Defendants cannot meet Rule 8’s other requirement that the district court denied a stay or

otherwise failed to afford the relief requested. Fed. R. App. P. 8(a)(2)(A)(ii).

In short, the district court's order did exactly what Defendants asked. Defendants sought, and received, a short stay. That Defendants were not more specific in their request is an improper basis for levying a substantial burden on Plaintiffs. Had Defendants wanted a longer stay, they should have moved to modify the district court's judgment under Fed. R. Civ. P. 52(b). Defendants failure to do so renders their motion out of compliance with Federal Appellate Rule 8.

**b. Intervenor-Defendant Cannot Satisfy Rule 8's Requirements Either.**

Unlike Defendants, Intervenor-Defendant did not ask the district court for a stay of proceedings. Nevertheless, Intervenor-Defendant now claims that asking the district court for a "further stay" would be "impractical." Doc. 4 at p. 1. In support, Intervenor-Defendant can only point to the weekend between October 18, 2024 and the expiration of the district court's stay on October 22, 2024. Intervenor-Defendant's motion ignores two key points, both of which render their motion equally as defective as Defendants'.

First, Intervenor-Defendant offers no explanation as to why they did not file a motion with the district court. Instead of immediately moving for a modification of the order, Intervenor-Defendant waited until the end of the day on October 18, 2024—a Friday—to file the present motion. Intervenor-Defendant’s arguments on impracticability fall flat. Based on the district court’s order, such a request was clearly not impracticable, especially considering it granted Defendants’ request for a stay. Doc. 6 at 92.

Second, Intervenor-Defendant cannot meet Rule 8’s explicit requirements for when a motion to stay is properly before this Court. As explained previously, the NCSBE sought and received a stay. Thus, the record clearly reflects that Intervenor-Defendant made a conscious choice to neither seek its own stay nor ask the district court to modify the length of its stay. As a result, Intervenor-Defendant’s motion is similarly defective and cannot satisfy Rule 8.

**II. Even if These Motions Were Properly Before This Court, a Stay is Inappropriate.**

A stay pending appeal is only appropriate where (1) the stay applicant has “made a **strong showing**” of likelihood of success on the merits; (2) the stay applicant will be irreparably injured without the

requested stay; (3) issuance of the stay will not substantially injure the nonmovants; and (4) the public interest favors a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009) (emphasis added). Even if Defendants' and Intervenor-Defendant's Motions are properly before the Court, a stay is not appropriate here for at least two reasons. First, Defendants cannot make a strong showing that they are likely to succeed on the merits of their appeal because the district court appropriately declined to exercise supplemental jurisdiction over the novel issue of state law presented by Count Two. Second, Plaintiffs would be irreparably harmed by a further stay because a stay would preclude effective relief prior to the election, and the public interest does not favor a stay to determine a discretionary jurisdictional issue rather than the prompt resolution of Plaintiffs' case on the merits. As such, Defendants' and Intervenor-Defendant's Motions should be denied.

**a. Defendants and Intervenor-Defendant have not made a strong showing of likelihood of success of their appeal.**

**i. Plaintiffs' state constitutional claim is a novel issue that state courts should resolve.**

Plaintiffs' state constitutional claim does not arise under federal law pursuant to 28 U.S.C. §1331 because (1) it cannot be decided without disrupting the federal-state balance approved by Congress and (2) it does not raise a substantial, actually disputed issue of federal law. *See Old Dominion Elec. Coop. v. PJM Interconnection, LLC*, 24 F.4th 271, 280 (4th Cir. 2022) (quoting *Gunn v. Minton*, 568 U.S. 251, 258 (2013)), *cert. denied*, 143 S. Ct. 87 (2022)).

The district court correctly determined that Count Two raises a novel issue of state constitutional law. N.C.G.S. §163-82.4(a) requires that certain information be collected in voter registration applications, which in turn informs list maintenance procedures under §163-82.11(c). Failure of a state agency to comply with mandatory state and federal reporting requirements can independently violate Article I, Section 19 of the North Carolina Constitution by diluting the votes of eligible voters with ineligible voters.

Furthermore, as the district court reiterated, allowing states to interpret their own constitutions is a foundational principle of federalism. Doc. 6 at 17 (citing *Martin v. Hunter's Lessee*, 14 U.S. 304, 325 (1816)). Federal courts are not meant to be the arbiters of state constitutional questions, and wading into an issue of state-specific voter registration regulations presented by Plaintiffs here would elide the proper relationship between the state and federal courts. See *Minnesota v. Nat'l Tea Co.*, 309 U.S. 551, 557 (1940) (“It is fundamental that state courts be left free and unfettered by [federal courts] in interpreting their state constitutions.”). Tellingly, Defendants’ and Intervenor-Defendant’s briefs fail to meaningfully engage with the balance of federalism that was key to the district court’s decision.

Further, Defendants cannot make a strong showing that Count Two necessarily presented a substantial, actually disputed question of federal law. Defendants overstate a footnote in the district court’s opinion about the fact that they argued Count Two raises the same issues as the dismissed Count One but ignore the fact that the district court previously indicated “Defendants have not convincingly argued” Count Two raised a federal question and merely “assume[d] without

deciding that this claim necessarily raises a disputed and substantial issue of federal law.” *Compare* Op. 16-17 *with* NCSBE Br. at 8 (quoting Op. 17 n.2); DNC Br. at 5 (same). Regardless, there is no necessarily presented, substantial, or disputed federal question in Count Two:

- Plaintiffs’ state constitutional claim does not necessarily raise a federal question. “[A] plaintiff’s right to relief for a given claim necessarily depends on a question of federal law only when every legal theory supporting the claim requires the resolution of a federal issue.” *Flying Pigs, LLC v. RRAJ Franchising, LLC*, 757 F.3d 177, 182 (4th Cir. 2014) (emphasis in original). “In other words, if the plaintiff can support [the] claim with even one theory that does not call for an interpretation of federal law, [the] claim does not arise under federal law[.]” *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 818 (4th Cir. 2004). The issue of whether 225,000 persons should have been registered to vote in the first place is a separate, but related, issue to HAVA. *See* N.C.G.S. §§163-82.11(c), 163-82.4(a).



- For much the same reason as there is no necessarily presented federal question, there is no substantial federal question involved in Plaintiffs' state constitutional claim. HAVA defers to state law when determining the sufficiency of the information received from a registrant. *See* 52 U.S.C. §21083(a)(5)(A)(iii). As state law defines the contents of the voter registration form, *see* N.C.G.S. §82.4(11), what is and is not sufficient information received from a qualified person seeking to register to vote is a matter of state law.
- Even if HAVA is implicated in Plaintiffs' state constitutional claim, Defendants' noncompliance with HAVA is undisputed. Defendants conceded that they allowed applicants to register to vote without providing a social security number or driver's license number, and thereby violated HAVA. (Doc. 6 at 19-20).

Accordingly, Plaintiffs, not Defendants or Intervenor-Defendant, are likely to succeed on the merits in this appeal, and there should be no stay in the interim.

**ii. Removal under 28 U.S.C. §1443(2) is improper.**

Defendants likewise cannot show that the district court erred in finding their removal under 28 U.S.C. §1443(2) was inappropriate. Section 1443(2) permits removal in cases involving “any act under color of authority derived from any law providing for equal rights,” or the refusal “to do any act on the ground that it would be inconsistent with such law.” §1443(2). The district court correctly identified “[t]he problem with [Defendants’] theory”—namely, that the Supreme Court “has limited the meaning of a ‘law providing for equal rights’ in § 1443 to only those concerning racial equality.” Doc. 6 at 34 (quoting *Vlaming*, 10 F.4th at 309). In *State of Georgia v. Rachel*, 384 U.S. 780 (1966), the United States Supreme Court precluded the possibility of removal jurisdiction under §1443 for causes of action under laws that “are phrased in terms of general application available to all persons or citizens,” as opposed to “specific language of racial equality.” Doc. 6 at 14 (quoting *Rachel*, 385 U.S. at 792).

Despite Defendant’s contentions to the contrary, the statutes in question are “phrased in terms of general application available to all persons or citizens” and do not contain “the *specific language of racial*

*equality* that §1443 demands.” *Vlaming*, 10 F.4th at 309 (emphasis added). Therefore, Defendants’ argument on the merits necessarily fails and they are not entitled a temporary stay because they are not “likely to succeed on appeal in reversing [the] order.” *Nken v. Holder*, 556 U.S. 418, 435 (2009).

Defendants agree that removal under §1443(2) requires a law concerning racial equity. Br. at 10 (quoting *Vlaming*, at 309). But the federal laws at issue here, NVRA and HAVA, do not explicitly deal with racial equality as required by *Vlaming*. Defendants erroneously claim that the NVRA is “indisputably [the] kind of law” that provides for equal rights. Br at 10. In support, they point to the congressional findings in statute which indicate that the NVRA was enacted to “eliminate ‘discriminatory and unfair registration laws and procedures’ that ‘have a direct and damaging effect on voter participation . . . and disproportionately harm voter participation by *various groups, including racial minorities*.” *Id.* (quoting 52 U.S.C. §20501(a)(3)). Defendants point to no “specific language” regarding racial equity that §1443 demands. Moreover, This language is far less convincing than defendants would like it to be. The general concern highlighted by the

congressional finding was a desire to remedy laws that have a damaging effect on “voter participation” by “various groups.” While racial minorities were one of the groups that could be negatively affected by discriminatory and unfair registration laws, the findings cited by the defendants in 52 U.S.C § 20501 display concern for harms to many groups rather than specific focus on racial equality.

Defendants also fail to adequately explain why removal was denied by the Supreme Court in *Rachel* if all that is required is that a law be the “kind of law” that provides for equal rights. Indeed, in *Rachel*, the Supreme Court held that “broad contentions under . . . the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under §1443.” 384 U.S. at 792. One would be hard pressed to identify a law that was more the “kind of law” that provides for equal rights than the Fourteenth Amendment, but removal was still improper under §1443 because “the guarantees of those clauses are phrased in terms of general application . . . rather than the specific language of racial equality that §1443 demands.” *Id.*

Furthermore, even if the NVRA were a law that would support removal under §1443, the circumstances under which defendants seek

to remove in this case do not apply. Defendants seek removal specifically because they are refusing to employ the remedy requested by plaintiffs on the grounds that such an action would violate the NVRA. Under the second clause of 18 U.S.C. §1443(2), a defendant may remove to federal court for “refusing to do any act on the ground that it would be inconsistent with [a law providing for equal rights].” In *City of Greenwood v. Peacock*, 384 U.S. 808 (1966), the Supreme Court observed that the refusal to act phrase was added by congress “[t]o enable State officers, who shall refuse to enforce State laws discriminating . . . on account of race or color, to remove their cases to the United States courts.” *Id.* at 824 n.22.

Here, defendants cite no law discriminating on account of race or color which they are refusing to enforce. Instead, defendants claim that the NVRA prevents them from taking an action, namely systematically removing registered voters fewer than 90 days from the general election. This subtle but important distinction completely undermines any basis for defendants’ argument for removal under the “refuses to take action” clause of §1443(2). In order for removal to be warranted under §1443(2), defendants must argue that they are refusing to enforce

a law that discriminates on account of race or color. Instead, they argue that they are justified in refusing to act under a law that allegedly provides for equal rights. This is the equivalent of defendants raising a federal defense to having to take an action rather than a claim that they are refusing to enforce a law that discriminates on the account of race or color. A federal defense is not sufficient to support removal. *Franchise Tax Bd. of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 14 (1983). (“[A] case may not be removed to federal court on the basis of a federal defense.”). Because defendants have failed to identify any discriminatory law that they are refusing to enforce, they have no grounds for removal under §1443(2). Once again, defendants’ argument fails on the merits and, therefore, they fail to establish that they are entitled to a temporary stay.

**iii. The Court correctly declined to exercise supplemental jurisdiction over Count Two after dismissing Count One.**

For much the same reason as Count Two does not arise under federal law, the district court correctly declined to exercise supplemental jurisdiction after dismissing Count One. A district court “may decline to exercise supplemental jurisdiction” where “the claim

raises a complex or novel issue of state law,” “the claim substantially predominates over the claim . . . over which the district court has original jurisdiction,” or “the district court has dismissed all claims over which it has original jurisdiction.” 28 U.S.C. §1367(c)(1)-(3). Declination of supplemental jurisdiction is appropriate under each of these provisions.

The district court appropriately declined to exercise supplemental jurisdiction under §1367(c)(1) because, as discussed extensively *supra*, this matter involves a novel issue of state law. Likewise, declining supplemental jurisdiction under §1367(c)(2) and (c)(3) is merited because the district court dismissed Count One. “[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988), *superseded on other grounds by* 28 U.S.C. §1447(c). Because the state constitutional claim is the only remaining claim, it *de facto* “substantially predominates” over Count One. Moreover, “the district

court has dismissed [Count One] over which it has original jurisdiction.” §1447(c)(2). The district court did not have original jurisdiction over Count Two and declining supplemental jurisdiction under (c)(3) was proper.

The district court’s decision to decline supplemental jurisdiction was not reversible error. “Once a district court has dismissed the federal claims in an action, it maintains ‘wide discretion’ to dismiss the supplemental state law claims over which it properly has supplemental jurisdiction.” *Yashenko v. Harrah's NC Casino Co., LLC*, 446 F.3d 541, 553 (4th Cir. 2006) (quoting *Carnegie–Mellon Univ. v. Cohill*, 484 U.S. 343, 353–54 (1988)). Moreover, federal courts “are obliged to inquire *sua sponte* whenever a doubt arises as to the existence of federal jurisdiction.” *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278 (1977). In fact issues of supplemental jurisdiction may even be raised for the first time on appeal. *Doe by Fein v. District of Columbia*, 93 F.3d 861, 871 (D.C. Cir. 1996).

None of the cases cited in the DNC Brief support the notion that the district court improperly declined to exercise supplemental jurisdiction over Count Two. For example, in *Williams v. 5300*



*Columbia Pike Corp.*, 891 F.Supp. 1169, 1182 (E.D. Va. 1995), the district court did not dismiss the federal claims in the lawsuit and retained supplemental jurisdiction because a remanded case would involve a Virginia court applying Delaware law, meaning there would be no state court applying its own state's law, and thus no benefit to remand. Here, the sole potentially federal claim was dismissed. Remand here involves North Carolina courts interpreting the North Carolina Constitution. Similarly, in *Sherin v. John Crane-Houdaille, Inc.*, the district court declined to remand state law claims after the parties could have sought remand two years prior and the court already decided summary judgment motions. No.WDQ-11-3698, 2015 WL 1401853, at \*2 (D. Md. Mar. 24, 2015).

Instead, this case is more akin to *Arrington v. City of Raleigh*, 369 F. App'x 420 (4th Cir. 2010). In *Arrington*, the Fourth Circuit held that the district court should have sua sponte declined supplemental jurisdiction. Despite the plaintiff not requesting remand, the court held that “both the plain text of § 1367(c) as well as our precedents make clear that in this instance, that discretion should have been exercised to decline jurisdiction.” *Id.* at 422-23. “Indeed, our precedents evince a

strong preference that state law issues be left to state courts in the absence of diversity or federal question jurisdiction under circumstances such as those reflected here.” *Id.* at 423. In short, “[w]ith all its federal questions gone, there may be the authority to keep [this case] in federal court under 28 U.S.C. §§ 1367(a) and 1441(c) (2000), but there is no good reason to do so.” *Waybright v. Frederick County, MD*, 528 F.3d 199, 209 (4th Cir. 2008), *cert. denied*, 555 U.S. 1069 (2008). *See also Terrill v. Windham-Ashland-Jewett Cent. Sch. Dist.*, 176 F. Supp. 3d 101, 112 (N.D.N.Y. 2016) (citing S.D.N.Y. and E.D.N.Y. cases supporting same); *see also Doe 1 v. Varsity Brands, LLC*, No. 5:22-CV-00430-M, 2024 WL 1200303, at \*6 (E.D.N.C. Mar. 20, 2024) (citing *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278) (“On its own motion, a district court may raise issues regarding subject matter jurisdiction.”).

Defendants have not made a strong showing that the district court’s decision to remand Count Two was improper, and their stay should be denied.

**b. The Remaining Factors Weigh Against Entry of Stay**

Defendants have failed to demonstrate a “strong showing” of likelihood of success on the merits, making a stay unwarranted regardless of the Court’s evaluation of the other factors. Nevertheless, the remaining factors also weigh against a stay.

As to the second factor, the irreparable harm lies not with Defendants or Intervenor-Defendant, but with Plaintiffs if a stay is granted. It is the Plaintiffs who, by their lawsuit, seek to ensure that the state’s elections are conducted fairly and in compliance with the State’s constitution, without ineligible voters on its rolls. As the State Board acknowledges, early voting has already commenced, and time is of the essence. Allowing a stay would preclude Plaintiffs from effective relief prior to the election in which potentially ineligible individuals are voting. This alone weighs strongly against granting the requested stay. *See, e.g., Common Cause v. Rucho*, 284 F. Supp. 3d 780, 786 (M.D.N.C. 2018) (finding risk of impending election being conducted in unconstitutional manner to be a “substantial risk weigh[ing] strongly against granting the requested stay”).

More simply—without prompt resolution of Plaintiffs’ claim on the merits, any harm resulting from improper votes being cast would be

irreversible. If the case is delayed and the election proceeds with ineligible voters participating, the election results cannot be undone. The potential disenfranchisement of valid voters due to vote dilution caused by ineligible voters far outweighs any speculative procedural harm to Defendants.

**i. Public Interest Strongly Favors Denying a Stay**

Public interest “weighs heavily” in favor of Plaintiffs because the integrity of the election is at risk. *See Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 237 (M.D.N.C. 2020). The public interest is best served by allowing the state court to resolve these urgent election-related state constitutional issues without delay. Indeed, it “is the state judiciary that has the responsibility to protect the state constitutional rights of the citizens; this obligation to protect the fundamental rights of individuals is as old as the State.” *Corum v. Univ. of N. Carolina Through Bd. of Governors*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992). Further, the District Court acknowledged that allowing states to interpret their own constitutions is a foundational principle of federalism. Op. 17 (citing *Martin v. Hunter’s Lessee*, 14 U.S. 304, 325 (1816)). In light of these principles, it is

imperative that no stay be entered so the state court may take prompt action to uphold the constitutional rights of its citizens and the voting process.

Defendants argue that a stay serves the public interest by conserving judicial resources and avoiding duplicative litigation. (Defendants Br. p. 18). But while “ ‘stability and consistency are also virtues’ when it comes to elections, the infringement of the fundamental right to vote poses a far greater risk.” *See Democracy N. Carolina*, 476 F. Supp. 3d at 237. Defendants’ pursuit of a stay while they appeal a perceived procedural issue risks delaying any decision on the merits of Plaintiff’s claim until *after* the election, rendering any remedy meaningless. The public has no interest in such an outcome.

## **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants’ and Intervenor-Defendant’s motions for stay pending appeal.

Respectfully submitted, this, the 21st day of October, 2024.

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## **CERTIFICATE OF COMPLIANCE**

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(A)(7)(B) because it contains 5,158 words, excluding the parts of the brief exempted by FRAP 32(f).

2. This brief complies with the typeface and style-requirements of FRAP 32(a)(5) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Century Schoolbook size 12 font.

Respectfully submitted, this, the 21st day of October, 2024.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on October 21, 2024, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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# **Exhibit 1**

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION

---

REPUBLICAN NATIONAL COMMITTEE  
and NORTH CAROLINA REPUBLICAN  
PARTY,

Plaintiffs,

-vs-

Case No. 5:24-CV-547-M-RJ

NORTH CAROLINA STATE BOARD OF  
ELECTIONS, et al.,

Defendants,

and

DEMOCRATIC NATIONAL  
COMMITTEE,

Intervenor-Defendant.

---

MOTION HEARING  
OCTOBER 17, 2024  
THE HONORABLE CHIEF JUDGE RICHARD E. MYERS II  
UNITED STATES DISTRICT JUDGE

Risa Kramer, RMR, CRR  
Official Court Reporter  
United States District Court  
Wilmington, North Carolina

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TRANSCRIPT OF PROCEEDINGS

(Proceedings commenced at 10:02 a.m.)

THE COURT: All right. If the clerk would please call the case.

THE CLERK: Republican National Committee et al. versus North Carolina State Board of Elections.

THE COURT: Counsel, please state your appearance for the record.

MR. STRACH: Good morning, Your Honor. Phil Strach, Nelson Mullins, here for the plaintiffs, along with my colleague, Jordan Koonts.

MR. HOOPER: Good morning, Your Honor. Tom Hooper here on behalf of plaintiffs as well from the law firm of Baker Donelson.

MS. BOYCE: Good morning, Your Honor. My name is Sarah Boyce. I'm here on behalf of the State Board of Elections and the other State defendants.

MR. MOORE: Good morning, Your Honor. South Moore also on behalf of the State Board of Elections and other defendants.

MR. WAXMAN: Good morning, Your Honor. I'm Seth Waxman. I'm here on behalf of the intervenor defendants.

THE COURT: All right.

MR. PHILLIPS: Your Honor, Jim Phillips with

1 the Brooks Pierce law firm in Greensboro here on behalf  
2 of the intervenor defendants.

3 MS. FULTON: Shana Fulton, also Brooks  
4 Pierce, Raleigh office, on behalf of the intervenor  
5 defendants.

6 THE COURT: Okay. I'm checking my map here  
7 to make sure who everyone is. Thank you.

8 All right. We're here today on two motions,  
9 the plaintiffs' emergency motion to remand this matter  
10 to state court at docket entry 37 and the defendants'  
11 motion to dismiss at docket entry 30.

12 So we'll start with the motion to remand  
13 because we need to make sure that I have jurisdiction.  
14 So we'll start with that. And the Court's  
15 understanding, there -- two bases for removal in the  
16 notice for removal: Title 28, United States Code,  
17 1441(a) and Title 28, United States Code, 1443(2).

18 The defendants bear the burden as the party  
19 invoking the Court's subject-matter jurisdiction. So  
20 let's start with 1441(a). I'll tell you tentatively  
21 where I am so everybody knows what we're trying to talk  
22 about.

23 So we're trying to figure out if I've got  
24 original subject-matter jurisdiction over the  
25 constitutional claim. So the parties agree that this is

1 the Merrell Dow, Grable, and Gunn framework that we're  
2 working with here. So we're trying to figure out --  
3 it's a state law statute. The state law statute  
4 provides that we will follow federal law. So the  
5 federal claim is necessarily implicated because we're  
6 gonna have to understand the federal statute to enforce  
7 the state statute. So we have to figure out what the  
8 relationship is between two of those. So a question of  
9 federal law is necessarily implicated there.

10 The State Board of Elections shall update  
11 the statewide computerized voter registration list and  
12 database to meet the requirements of Section 303 of the  
13 Help America Vote Act of 2002 and reflect those changes  
14 when citizenship rights are restored under General  
15 Statute 13-1.

16 So we have the questions of: Is it  
17 necessarily raised? Is it disputed? Is it substantial?  
18 And does it affect the federal-state balance?

19 The parties agree it's necessarily raised.  
20 You have to interpret federal law to apply the state  
21 statute. The plaintiffs say there's no dispute here  
22 because the federal law is not disputed because there's  
23 an admission on the part of the Board that the voter  
24 registration form did not comport with HAVA. I think  
25 the substance underneath it is there's some percentage

1 of voters who are eligible and registered but did so on  
2 a form that doesn't meet the -- meet HAVA because the  
3 driver's license or the Social Security number digits  
4 were not necessarily required by the way the  
5 computerized registration form worked. That is, you  
6 could register under the State's computer system without  
7 complying with HAVA. And so some percentage of voters  
8 will have supplied it voluntarily, just gone ahead and  
9 filled it out on the form. Some percentage will have  
10 left it out altogether.

11 Some percentage of those who left it out  
12 altogether are eligible voters. And the concern is that  
13 some percentage of the folks who filled it out were not  
14 eligible voters and they didn't provide that. So we  
15 have some percentage unknown of ineligible voters who  
16 are registrants under the system. The question then  
17 becomes, "Well, what's our remedy? Do we remove those  
18 voters from the system or not? And would doing so, at  
19 this point, violate the NVRA?"

20 And so there's a question as to whether or  
21 not there's a defense, ultimately, under the NVRA that  
22 would affect what we can do at this point in the game.

23 Have I fairly stated where we are  
24 substantively?

25 MS. BOYCE: I think more or less, Your



1 Honor, yes.

2 THE COURT: Okay. So there are at least  
3 five statutory provisions interacting here that we're  
4 trying to sort out. And so that's where we are today.

5 And then the state constitutional claim is a  
6 state constitutional claim that -- I will tell you that  
7 I am particularly cautious of exercising supplemental  
8 jurisdiction over a state law claim in the first  
9 instance because I'm concerned about the federal-state  
10 balance, appropriately -- appropriately so, I think.

11 I am -- so my tentative conclusion is that  
12 there's no federal question as to count 2, the state  
13 constitutional law claim. But I think there is a  
14 federal question as to count 1 under the Merrell Dow  
15 provisions, the way they all operate together. That  
16 means I can get to original jurisdiction over count 1 as  
17 a matter of jurisdiction. Then there's a separate  
18 question of whether or not there's a private cause of  
19 action as to count 1 that's intended to operate under  
20 the statute that I'm supposed to use. And if that falls  
21 away on that basis, then I've got a supplemental  
22 jurisdiction claim over count 2 that -- I'm concerned  
23 about exercising supplemental jurisdiction if I find no  
24 private cause of action. And I would find no private  
25 cause of action in federal court and send -- say count 1

1    isn't here, send count 2 back to state court to be  
2    exercised, is where I'm leaning, having read everything,  
3    having thought about everything, and trying to think  
4    about how it all fits together.

5            The merits of the private right of action  
6    part actually matter because it helps figure out if  
7    there's a federal question that's intended to be there.  
8    So "Does HAVA provide a private right of action? Does a  
9    state statute provide a private right of action?" I  
10   think we have to think through also. But I think those  
11   are implicated but are in the -- in the jurisdictional  
12   question, but they're not dispositive. The jurisdiction  
13   question requires me to engage with that question.

14           I think I have jurisdiction over count 1.  
15   Then to the extent I would have it over the second, it  
16   would be as a result of supplemental jurisdiction.

17           But I'm concerned about the private cause of  
18   action as to whether or not plaintiffs have a right to  
19   be here on count 1. If they don't have a right to be  
20   here on count 1, then I shouldn't keep count 2. That's  
21   where I am.

22           So everybody now understands what the judge  
23   thinks, and so you know what you're talking to me about.

24           So the defendants are invoking removal of  
25   jurisdiction. I'll have you talk to me about -- so I

1 think you're with me on my -- on part of my reasoning  
2 and probably concerned about the second part of my  
3 reasoning; and, I think, vice versa. So we'll start  
4 with -- we'll start with the plaintiffs, and then we'll  
5 -- on jurisdiction. Then we'll flip it and start with  
6 the -- we'll start with the defendants on jurisdiction.  
7 Then we'll flip it and start with plaintiffs on private  
8 right of action. So I'll start with y'all.

9 MR. MOORE: Thank you, Your Honor.

10 I will skip, then, right to count 2. I  
11 think for two reasons, you could have jurisdiction over  
12 count 2 without needing to exercise supplemental  
13 jurisdiction.

14 The first is -- I believe that count 2 also  
15 necessarily raises the same federal question as count 1.  
16 The way I understand plaintiffs' constitutional claim is  
17 that they only have a claim under the North Carolina  
18 Constitution if these voters must be removed under HAVA.  
19 And so to determine, obviously, whether HAVA requires  
20 the removal of those voters, you must construe HAVA so  
21 it is necessarily raised. It is still actually  
22 disputed. The State Board and plaintiffs disagree over  
23 whether HAVA requires the State Board to remove the  
24 voters who registered using this prior form but did not  
25 provide a driver's license or Social Security number.

1 And for the same reasons that that question is  
2 substantial as it relates to count 1, it is substantial  
3 as it relates to count 2, that being this is a federal  
4 election, that -- that HAVA -- Congress enacted HAVA to  
5 impose uniformity among the minimum standards for  
6 election administration, and also that the Attorney  
7 General -- the United States enforces HAVA, so there's a  
8 federal interest in having federal courts construe the  
9 statute.

10 I hear your concerns about the federal-state  
11 balance as it relates to a state constitutional claim.  
12 But I don't think here that should compel remand, or at  
13 least compel the determination that there is no federal  
14 question jurisdiction over the state constitutional  
15 claim. For one thing, you know, I think plaintiffs have  
16 spoken a lot about Pullman abstention. But Pullman  
17 abstention only applies when there is a federal  
18 constitutional claim. There isn't a federal  
19 constitutional claim here. So if you have federal  
20 question jurisdiction, as I assert you do, you don't  
21 have a basis to abstain from exercising that  
22 jurisdiction.

23 I'm happy to answer other questions about  
24 1441 as it relates to the count 2. But if not, I'm  
25 happy to move on to why I think 1443 also provides you

1 jurisdiction over count 2.

2 THE COURT: So you're applying the same  
3 Merrell Dow factors and just saying the state  
4 constitutional question is so inextricably intertwined  
5 with federal law that those -- that it becomes a federal  
6 question under Merrell Dow and its progeny.

7 MR. MOORE: Yes, Your Honor. The way I read  
8 their complaint, they do not have an Article 1, Section  
9 19 claim unless HAVA requires the State Board to remove  
10 these voters. And determining that turns on, obviously,  
11 a construction of HAVA, not North Carolina law.

12 THE COURT: Okay. All right. Thank you.

13 MR. MOORE: Okay.

14 And then, you know, I also think 1443(2)  
15 provides a distinct and independent basis for this Court  
16 to exercise jurisdiction over plaintiffs' state  
17 constitutional claim. Plaintiffs seek, as their remedy  
18 for the state constitutional claim, an injunction  
19 ordering the State Board to remove these voters. The  
20 State Board is refusing to do that because doing so  
21 would violate the National Voter Registration Act, and  
22 that is a federal civil rights law.

23 THE COURT: All right. This is where I have  
24 some concerns. After Vlaming, the Fourth Circuit case  
25 that interprets Rachel, that -- where we say it has to

1 explicitly be stated in terms of race. So civil rights  
2 law in this context is actually a much narrower  
3 interpretation of civil rights law than the plain  
4 language would state. Now, you're talking to somebody  
5 who likes to start with the plain text, but that's not  
6 permitted. I'm precluded under Vlaming from doing just  
7 a straight initial texture analysis because Vlaming said  
8 we take Rachel, we then follow Vlaming -- Vlaming has  
9 adopted Rachel in terms of the second clause as well.  
10 1443(2) applies it there as well. And so because it's  
11 not explicitly stated in terms of race, it's not a civil  
12 rights law within the context of 1443(2)'s determination  
13 of what constitutes a civil rights law.

14 So you're gonna have to work me -- you're  
15 gonna have to talk me through that to tell me why this  
16 is a racially explicit law that covers it where -- so  
17 there's a heading somewhere that says "For all the  
18 following reasons, it's important." But we actually  
19 look at it, it's not racially explicit. And civil  
20 rights is very narrow in this context, not broad, after  
21 Vlaming. So I'm trying to sort through that.

22 MR. MOORE: Of course, Your Honor.

23 So of course I agree that Vlaming requires  
24 that the civil rights law be one intended to address  
25 racial discrimination. And I think, as you just

1 referenced, there is a statute in the plain text of the  
2 NVRA that says one of the purposes of the NVRA is to  
3 eliminate close-to-election voter purges because those  
4 purges tended to be racially discriminatory.

5 So I take your point that that is sort of at  
6 the beginning of the statute, and the actual prohibition  
7 the NVRA imposes on purging voters does not come until  
8 several sections later, 20507. But the two are directly  
9 related. It is the voter purge provision of the NVRA,  
10 the provision that Congress said was necessary to  
11 eliminate racially discriminatory voter purges, that we  
12 are saying prohibits the State Board from taking the  
13 actions that plaintiffs request.

14 I do want to emphasize that it is important  
15 that the -- it be the -- the civil rights law be the one  
16 intended to address racial discrimination. I think  
17 plaintiffs have suggested that 1443(2) requires that the  
18 state law be racially discriminatory. And I do not  
19 think that is the correct reading of the text of 1443.

20 THE COURT: Now, when I read Rachel, Rachel  
21 said to be able to determine it in the first instance --  
22 now it's in a different context; it's in 1443(1), not  
23 (2). But Rachel said to be able to tell ex ante if  
24 there is a racial concern, it has to be that state law  
25 on its face is racially discriminatory. That is, there

1 has to be a racially discriminatory component. It's not  
2 gonna be as applied. It has to be that the state law  
3 that we're concerned about that the civil rights law is  
4 addressing is racially discriminatory. That's what  
5 Justice Stewart is sort of talking about, working his  
6 way through in Rachel, right? So he's working his way  
7 through "How do I know in advance if race is  
8 implicated?" Well, is the state law racially  
9 discriminatory? Then a state law that is racially  
10 discriminatory in its face can then -- somebody can then  
11 remove it to say, "You're gonna enforce a law against me  
12 that's discriminatory."

13 This is sort of the opposite context because  
14 it's section 2, and so we're sort of thinking slightly  
15 differently about what we're trying to fix. But what's  
16 the relationship between whether or not the state law is  
17 racially discriminatory? And the right to remove it --  
18 that is, the whole question is can I get a fair -- "Can  
19 I get fair treatment in the state courts," is what  
20 1443(2) is about, is "Will the state courts either  
21 violate federal law predictably because their statute is  
22 inconsistent with antidiscrimination laws? Or will they  
23 refuse to give me the remedy that I have a right to when  
24 I come to federal" -- "when I go to state court, so I  
25 have to take it to federal court" -- we're supposed to



1 interpret our removal statutes narrowly. I've got  
2 Vlaming. I've got Rachel. I'm trying to figure out how  
3 discriminatory do I have to -- how much am I casting  
4 aspersion on the state court by saying there's a  
5 discriminatory concern for 1443(2) to be the basis when  
6 it's not clear to me that there is a explicit racial  
7 focus of the NVRA as opposed to we want to protect  
8 everybody for all reasons. It goes -- it has one -- one  
9 basis, but then it has so many others that it ultimately  
10 says, "We protect all voters, not just voters who are  
11 being discriminated against on the basis of race,"  
12 right? It's hortatory at the beginning. It's an early  
13 paragraph. But it has multiple bases. And so the  
14 question is, is it -- is the one mention enough to make  
15 this explicitly racial under Vlaming or not?

16 MR. MOORE: So there are a few things in  
17 there, Your Honor, so I'll try to take them in pieces.

18 First, I don't think the text of 1443(2)  
19 requires you to cast any aspersions on North Carolina  
20 state courts, and we are not casting those aspersions  
21 either by removing this case.

22 I agree that Rachel does talk about, in  
23 relation to a different part of 1443, a concern that  
24 state courts might not enforce federal civil rights  
25 laws. But 1443(2) is actually about ensuring that there

1 is a federal venue for the federal civil rights law  
2 Congress passes to address racial discrimination. And  
3 the NVRA is just such a statute.

4 I mean, I want to read you directly the  
5 provision right at the beginning. It says that the NVRA  
6 was enacted to eliminate, quote, "discriminatory and  
7 unfair registration laws and procedures that have a  
8 direct and damaging effect on voter participation in  
9 elections for federal office and disproportionately harm  
10 voter participation by various groups, including racial  
11 minorities." The NVRA was explicitly thinking about  
12 eliminating racial discrimination when it enacted things  
13 like this purge -- or ban on the purge of voters fewer  
14 than 90 days before an election. And I think you also  
15 said there was just this one provision, but there's also  
16 legislative history supporting this view of the NVRA.

17 In the Senate report, there's a discussion  
18 about how despite the great progress that the United  
19 States has made in eliminating racial discrimination in  
20 voting because of laws like the Voting Rights Act, these  
21 late-in-time voter purges are still resulting in racial  
22 discrimination, and the National Voter Registration Act  
23 is necessary to eliminate that racial discrimination.

24 THE COURT: Okay.

25 MR. MOORE: I'm happy to answer any other

1 questions the Court has. If there are no further  
2 questions, I would just close with two points.

3 First, again, I think you should exercise  
4 both -- or either federal question jurisdiction, our  
5 civil rights removal jurisdiction, over both of  
6 plaintiffs' claims.

7 I would also ask that if you are inclined to  
8 enter a remand order, we, of course, do not believe you  
9 should, but I would ask you to enter some sort of  
10 reasonable stay of that order to allow the State Board  
11 time to appeal, as the State Board has the right to  
12 appeal because of 1447(d).

13 THE COURT: All right. Thank you, counsel.

14 MR. MOORE: Thank you, Your Honor.

15 MR. WAXMAN: Your Honor, I have just a few  
16 points to add.

17 Obviously we agree with the State Board on  
18 this issue. We certainly agree with your tentative  
19 views about count 1. And I don't want to waste the  
20 Court's time by quibbling with a few of the things that  
21 you said or assume that I think are perhaps incorrect.

22 THE COURT: Quibble away. I want to get  
23 this right, so if you think I'm getting something wrong,  
24 tell me.

25 MR. WAXMAN: Well, number one: Although I

1 don't think anything in this lawsuit turns on whether  
2 the prior form did or didn't violate HAVA, our position  
3 is that it certainly did not violate HAVA. The State  
4 Board in its December 6th ruling did not say it. It  
5 said that the use of the prior form may have permitted  
6 some violations of HAVA, although I'm not sure why. And  
7 our view is, look, the form, which you have -- we  
8 printed in the briefs -- has it -- you know, has a place  
9 to put in both the driver's license and the last four  
10 digits of the Social Security number. And it also has a  
11 box, which says in plain terms, you should -- you know,  
12 you should fill out or you must include your driver's  
13 license number, and if you don't have it, the last four  
14 digits of your Social Security number, and if you don't  
15 have either, you must provide HAVA-compliant ID when you  
16 come to vote.

17           The Board was convinced that the form could  
18 have been more clear, but that is not a finding that the  
19 prior form violated HAVA. And we would dispute that.  
20 But in any event, my bottom-line point is nothing turns  
21 on this because this is a cause of action in mandamus.  
22 And the point of mandamus is not whether there was some  
23 prior form that's no longer being used. That's not what  
24 the mandamus remedy is. This is a mandamus argument  
25 that basically says you have a ministerial,

1 nondiscretionary duty to either deregister these 225,000  
2 voters or require them to vote provisionally when they  
3 show up and present, as federal and state law require,  
4 both HAVA-compliant identification and photo  
5 identification.

6 This isn't a question of we're arguing about  
7 a remedy. Their claim in mandamus is that we are  
8 required, without any doubt whatsoever, to do one of  
9 these two things. And so this isn't a defense.

10 Now, just going -- those are the only  
11 quibbles that I had with your articulation.

12 With respect to the count 2, there's no  
13 question that the Grable-Gunn test, you know, applies  
14 with respect to count 2 as it does with respect to count  
15 1. It doesn't distinguish between state statutory  
16 claims and state constitutional claims. This  
17 constitutional claim, to the extent that one can  
18 understand anything about what it is, in the very first  
19 paragraph under count 2, paragraph 90 -- I mean,  
20 paragraph 89 says the following paragraphs are  
21 incorporated by reference.

22 90 says that we have a nondiscretionary duty  
23 to maintain the state's voter rolls in a manner  
24 compliant with Section 303 of HAVA. And by the way,  
25 incorporating all of the other paragraphs of this

1 complaint, this is a complaint which, from paragraph 3  
2 until the very end of paragraph 20 -- paragraph 3  
3 basically says this is a lawsuit about compliance with  
4 Section 303. All of the -- even the addendum -- the  
5 remedy provisions reference it. In 20 pages, this  
6 complaint cites HAVA 55 times, including with respect to  
7 the constitutional claim, both by incorporation and  
8 expressly in paragraph 90.

9 And so the -- it just seems to me the same  
10 analysis applies. And with respect to -- I think  
11 that's -- that's basically -- that's our point with  
12 respect to the constitutional claim.

13 This complaint, from start to finish,  
14 including the constitutional claim, whatever the  
15 constitutional violation is, expressly turns on  
16 establishing that there is a fundamental failure to  
17 comply with HAVA Section 303. And therefore, the same  
18 section 1331, 1441 provisions apply equally.

19 Now, with respect to 1443(2), I certainly --  
20 to me, this is a -- I think this is the heartland of  
21 what paragraph -- subsection (2), as opposed to  
22 subsection (1), is designed to get at. This doesn't  
23 depend, you know, on any aspersion about state courts,  
24 and it doesn't depend on the text of the state law  
25 itself. The state law itself doesn't -- I mean, I'm not

1     sure there are any extant state laws anywhere in this  
2     country that make distinctions based on race. They  
3     would be manifestly unconstitutional. But the question  
4     is -- the issue in this case under subsection (2) is was  
5     there a refusal to comply with that state law based on,  
6     you know, the text that we're all familiar with in -- in  
7     subsection (2).

8             And, you know, in this case, there is a  
9     manifest refusal based on the NVRA's 90-day removal ban,  
10    which is incorporated by reference into HAVA, which  
11    is -- as was said, is a law that provides for the  
12    fundamental right to vote and prohibits expressly, in  
13    the relevant provision, discrimination and unfair  
14    registration laws and procedures, which the Congress has  
15    found disproportionately harm racial minorities.

16            So, you know, taking, you know, Rachel for  
17    all of its worth and saying notwithstanding the actual  
18    text that talks about equal rights, this requires a  
19    state court -- a state refusal to comply with state law  
20    because of a -- because it -- the state official  
21    believes it is prohibited by a law that was enacted to  
22    protect equal rights and -- against discrimination  
23    against racial minorities.

24            You asked a question about a private right  
25    of action. And I don't -- I'm not sure if...

1 THE COURT: Well, I think --

2 MR. WAXMAN: -- my colleague addressed it,  
3 but I'm happy to since --

4 THE COURT: Well, I think we're gonna come  
5 back to it in a moment when we flip directions. Right  
6 now I'm making sure I have jurisdiction and that I'm  
7 supposed to hear the case.

8 MR. WAXMAN: Right. All I was gonna say is  
9 whether there is or isn't a private right of action is a  
10 reason -- is dependent on whether you dismiss or not.  
11 It's not relevant to whether there is jurisdiction under  
12 1441 or 1433. Thank you.

13 THE COURT: All right.

14 MR. STRACH: Thank you, Your Honor. Good  
15 morning.

16 So trying to address the Court's thinking,  
17 where you're headed with this -- so I'll kind of throw  
18 my notes out, so we'll see how it goes.

19 THE COURT: Well, you can -- you do whatever  
20 your best argument is. If I'm wrong, tell me. That's  
21 what I'm trying to figure out.

22 MR. STRACH: I don't like arguing the briefs  
23 because it's pointless.

24 So I think, to be clear, this is not a HAVA  
25 lawsuit. Okay? I want that to be very crystal clear.



1 HAVA provides an important background for understanding  
2 what has to happen, but HAVA's not the basis for the  
3 lawsuit. Had it been, we could have easily pled that.

4           There are several state statutes that  
5 require the Board to maintain and to request the  
6 driver's license number or the last four. There's the  
7 one that's been cited, 163-82.11. There's also  
8 163-82.4(a)(11), which specifically says that the form  
9 shall request this information. It didn't do that for a  
10 long time. And the Board effectively admitted that when  
11 they considered the complaint that they considered in  
12 December of last year.

13           The question now is what do we do about  
14 that? What do you do? And, Judge, I think you're  
15 exactly right. I think there are buckets of people in  
16 this situation, some who may be eligible, some who may  
17 not be, some who provided the information, some who  
18 didn't and aren't eligible. When this was pending in  
19 state court, we submitted discovery requests and asked  
20 them to expedite the response to get at that very  
21 question, to see what are the buckets of people that  
22 we're talking about so that the courts can know what to  
23 do.

24           But this is a state court action. This is  
25 based on state statutes that require the collection of

1     this information. It wasn't done. The state courts now  
2     get to decide what the remedy is.

3                 Now, if the Board says, "Well, whatever  
4     remedy you're asking for will violate federal law,"  
5     that's a defense. They can raise that in the state  
6     court. I'm sure the state court will take due notice of  
7     it. And the state court can craft something to make  
8     sure that only eligible voters vote in the election.  
9     That's a quintessentially state court thing to do.

10                So it's not a HAVA lawsuit. Whether there's  
11     a private right of action under HAVA, there's probably  
12     not. And if that's a basis for kicking it back, then I  
13     would agree with that. But we haven't raised a HAVA  
14     lawsuit.

15                THE COURT: What do you say to the concern  
16     -- the 1443(2) concern? That is, this is, in fact, a  
17     civil rights statute. We have a right to removal under  
18     it because the State Board is saying, "We're not going  
19     to do it." That is, the NVRA is a civil rights statute.  
20     "We are refusing to do any act on the ground that it  
21     would be inconsistent with such law, so we have a right  
22     to removal under 1443(2)."

23                MR. STRACH: I think that's just incorrect,  
24     number one. I've not seen a case cited yet that says  
25     NVRA or HAVA are racial discrimination statutes. So

1     that's, at best, an open question. And it seems pretty  
2     clear to me that they're not. It's certainly not the  
3     Voting Rights Act.

4             This Court, couple two, three years ago,  
5     remanded a case that, frankly, I removed that was based  
6     on allegations that state officials would have to  
7     violate the Voting Rights Act. That got kicked back  
8     down under 1443(2), affirmed by the Fourth Circuit.

9             I've not seen a case yet that says that  
10    would come anywhere close to talking about the NVRA  
11    being a racial discrimination statute. And not even the  
12    Congressional findings that my colleagues cite really  
13    say that explicitly.

14            And so I think once you're looking at  
15    Congressional findings to support a basis for removal,  
16    you're already out on thin ice. And clearly, the  
17    findings that were in this law wouldn't support it  
18    anyway.

19            The other thing, though, Your Honor, just  
20    about the substance of the claim they're making, is  
21    they're assuming that a state court is gonna require  
22    them to violate federal law. They're just making that  
23    assumption. We have no idea. What we've asked for in  
24    our complaint is to remove voters if it's consistent  
25    with federal law. We haven't asked the state court to

1 do anything inconsistent with federal law. We've asked  
2 them alternatively to require folks to vote  
3 provisionally so that the information can be collected.  
4 So we haven't asked them to do -- and of course  
5 provisional voting is expressly allowed by HAVA, and  
6 sometimes required by HAVA. So we haven't asked the  
7 state courts to do anything. This is just pure  
8 speculation on their part.

9 So I think they've put the cart before the  
10 horse in many respects on this issue.

11 THE COURT: So the timing of the refusal is  
12 critical here. Right? If 1443(2) grants jurisdiction  
13 once the refusal has taken place, not when it's  
14 prospective.

15 MR. STRACH: That's right. And there's been  
16 no such thing here.

17 Now, if the state court comes along and  
18 says, "You have to do X, Y, and Z," and the Board says,  
19 "Well, we can't do that," then we're taking it back.  
20 Okay. You know, at least now you've been ordered to do  
21 something. You're refusing that order. You're taking  
22 it up.

23 Right now, there's been no order to do  
24 anything. That's what we're just trying to get to. And  
25 we think the state courts have the right to do that.

1           And, Your Honor, I would just point out too,  
2   to the extent that the state courts require the Board to  
3   have these folks vote provisionally, this is nothing  
4   new. We're not asking anything earth-shattering. If  
5   Your Honor -- if you go to vote and you don't bring your  
6   ID, and you don't find -- sign the reasonable impediment  
7   form, you're gonna vote provisionally. And they're  
8   gonna say, "Hey, come back to the Board, bring your ID,  
9   and your vote's gonna count."

10           This is no different from that. This is  
11   simply saying we're asking the state courts -- have them  
12   vote provisionally, let them know why they're voting  
13   provisionally, tell them they got to bring this  
14   information back to the Board or to the elections  
15   officials, and boom, the vote will count. It will be no  
16   different than many other types of situations.

17           So much of this is just being sort of blown  
18   out of proportion about what we're seeking. We're not  
19   asking to just wholesale remove people. We want to find  
20   out from the Board, through discovery, what the buckets  
21   are. And then we want to ask the state court to come up  
22   with the right remedy under state law. That's either  
23   through a mandamus or through state constitutional  
24   provision. But all of that can be done under state law.  
25   I know that because I've done it recently, and I've done

1     it before.

2                 So absent the fact that the complaint talks  
3     about HAVA, no one would ever be thinking that this was  
4     a federal case because, to the extent the federal laws  
5     apply, they're defenses to whatever the state court  
6     might do as we get the case further down the road in  
7     state court.

8                 THE COURT: So is it your position, then,  
9     that HAVA provides, really, content that's hiding in the  
10    background? That's being imported into the state  
11    statute? So we don't have to interpret HAVA. We just  
12    have to say HAVA constitutes part of the content by  
13    reference.

14                MR. STRACH: It's clearly background. It's  
15    clearly important background. But the state statutes  
16    independently require the Board to collect this  
17    information.

18                Now, if they -- if the state courts say,  
19    "You didn't do it; here's what we're gonna do about it,"  
20    and they say, "Oop, that violates HAVA," that's a  
21    defense. They can raise that. But it is not -- HAVA  
22    itself is background, at best.

23                Now, did they pass these statutes probably  
24    because HAVA says this? Probably. They didn't have to.  
25    The legislature didn't have to promulgate these statutes

1     that says, "Hey, collect this information." They could  
2     have just relied on HAVA. And if they didn't do it,  
3     somebody could sue under HAVA. But the legislature  
4     thought it important enough to independently promulgate  
5     these directions. That's what we're suing under. We're  
6     just suing under those directions.

7             And if HAVA ends up being a defense down the  
8     road, fine. Deal with that. But it has nothing to do  
9     with the claims we brought.

10            THE COURT: All right. And is it possible  
11     to violate 163-82.11 without violating HAVA? If the  
12     statute says, "Comply," and the violation is you failed  
13     to comply, you have to have violated both, right?

14            MR. STRACH: I think you clearly would have  
15     violated the state statute, and query whether someone  
16     would have a cause of action under HAVA too. But that  
17     would be separate. The one does not require the other,  
18     going either way. I think that you -- again, if the  
19     legislature had just not put this in the statute, your  
20     only basis would be HAVA.

21            THE COURT: I understand. But what the  
22     legislature did do was say, "Comply with HAVA." Right?  
23     Said, "Comply with Section 303(a)." So to determine if  
24     there's been a violation -- I have to interpret the  
25     federal law to determine if there's been a violation of

1 the state law, right?

2 MR. STRACH: No because the information was  
3 clearly not collected. That's a -- that's a known fact.  
4 We don't know how many people that applies to. We know  
5 that information wasn't collected.

6 So the issue now is the remedy. And to the  
7 extent that the -- if some court has to fashion a  
8 remedy, HAVA is a defense. It's not -- it does not have  
9 to be construed as an independent claim.

10 THE COURT: Okay. But to violate the state  
11 statute, you have to say, "Did you follow the" -- the  
12 registration form and requirements come from HAVA and  
13 are imported into state law, right?

14 MR. STRACH: Well, that's under 82.11. But  
15 under the other statute I cited, 82.4(a)(11), there's --  
16 the legislature separately said that the form has to  
17 collect the specific information. So --

18 THE COURT: But there are two fonts. But  
19 one font is one that relies on federal law, right?

20 MR. STRACH: I'm sorry, Your Honor?

21 THE COURT: There are two fonts of that --  
22 there are two bases for that collection requirement.  
23 There's a pure state law simpliciter basis, and then  
24 there's the incorporation of federal law basis, right?  
25 They're both in the state statute.



1                   MR. STRACH: I might quibble with whether  
2 you say it incorporated federal law. It referenced it.

3                   THE COURT: Fair enough.

4                   MR. STRACH: But clearly they cite HAVA in  
5 the second one.

6                   THE COURT: Okay.

7                   MR. STRACH: But yes. On the first one, it  
8 just says, "Hey, you got to collect this information."  
9 They didn't do it.

10                  THE COURT: All right. Thank you.

11                  All right. The motion to dismiss asks a  
12 couple of questions. One is laches, which I think I can  
13 resolve from the papers. But if the parties feel they  
14 wish to argue it, I'll listen to it.

15                  Then there's the question of whether or not  
16 there is a private right of action under either the  
17 state or the federal law. So North Carolina law says  
18 implied rights of action are disfavored and will not be  
19 found in the absence of clear legislative intent, and  
20 that the intent must be to create a statutory protection  
21 for a particular group. So there's a question of  
22 whether or not there's a private right of action under  
23 North Carolina law because this -- you're the master of  
24 your complaint. It's a North Carolina complaint. So  
25 the question is does the statute that you're seeking to

1    enforce actually create the private right of action?  
2    We'll want to talk about that.  So does -- it doesn't do  
3    it expressly.  It doesn't say "and there shall be a  
4    private right of action," or "This shall be enforceable  
5    by."  It's silent.

6                    So the question is, I guess, what in the  
7    statute demonstrates a legislative intent to impliedly  
8    confer the private right of action?

9                    MR. STRACH:  Your Honor, it's an election  
10   law, and there are many times that people come in  
11   through a mandamus action to enforce election law.  
12   That's the -- that's the right of action.  It's common  
13   law right of action.  The legislatures recognized it.  
14   We've cited the statute.  So it's not federal common  
15   law.  It's state common law.  And we've used it -- in  
16   fact, we've used it recently to compel the Board of  
17   Elections to comply with state election law.  And it's  
18   used routinely.

19                    So no, you're correct.  There's nothing that  
20   says it creates a nice, little, neat little package of a  
21   private right of action.  But our contention is that the  
22   mandamus action allows that.

23                    As to the laches piece, Your Honor, let me  
24   just mention a couple dates to you so I make sure that  
25   the Court understands the timeline.  On June 19th of

1     this year, the State Board denied the request for relief  
2     violating a Carol Snow. And she was asking for them to  
3     remedy the fact that the form had not collected this  
4     information or required the collection of this  
5     information. So there was no -- no -- no way for anyone  
6     to know, until at least June 19th, what the Board was  
7     gonna do about this situation.

8                 We sent a letter on July 10th of this year.  
9     The Board blew that letter off. They literally just  
10    didn't respond to it. And so we filed the lawsuit on  
11    August 23rd, about a month or so after. So our  
12    contention is that is in no way anything close to  
13    laches. We knew what their position was gonna be. We  
14    wrote them a letter giving them a chance to change the  
15    position. They didn't do it. They blew it off, filed  
16    the lawsuit. All of it happened pretty quickly.

17                Only reason we're here right now, close to  
18    the election, is because they removed the case. I think  
19    this case would have already been resolved by now by the  
20    state courts had we been back in state court.

21                THE COURT: And have you got a citation for  
22    me? Is that the Graham County -- what case am I  
23    supposed to be looking for, for the relationship between  
24    mandamus and private right of action?

25                MR. STRACH: It's the general mandamus --

1 let's see. Yeah. We've cited the cases, Your Honor,  
2 that talks about the common law of North Carolina.

3 THE COURT: Right.

4 MR. STRACH: And then we did cite a -- oh.  
5 N.C. Gen. Stat. 4-1, which expressly, by statute,  
6 incorporates the common law into the law of North  
7 Carolina.

8 THE COURT: And that's a question of state  
9 law that you say you've successfully litigated in a  
10 different case?

11 MR. STRACH: Yes. Well, we've brought  
12 mandamus actions to enforce election laws.

13 THE COURT: Right.

14 MR. STRACH: And we -- nobody removed the  
15 case. Nobody said we didn't have a claim.

16 THE COURT: Okay. So it wasn't a contested  
17 part of that case. It's just been successfully done by  
18 the North Carolina courts.

19 MR. STRACH: That's correct.

20 THE COURT: All right. Thank you.

21 MS. BOYCE: Hi, Your Honor.

22 So I'll go quickly in turn to respond. And  
23 I'll start with the private right of action question and  
24 then touch on laches, and then one other issue that I  
25 think needs a little bit of attention.

1           First, with respect to the private right of  
2     action, you asked about both the federal right of action  
3     and the state right of action. I heard my colleague,  
4     Mr. Strach, to effectively concede that there is no  
5     federal right of action here under HAVA in his remarks  
6     earlier, so I won't waste your time with that.

7           With respect to the state cause of action,  
8     we agree with Your Honor that there is not a state cause  
9     of action here underneath this particular statute that  
10    they've cited, 82.11(c).

11          The way that I think about their claim,  
12    though, is that Mr. Strach is correct that they have a  
13    right to bring a mandamus claim. We have not contested  
14    their ability to bring the mandamus claim. Where the  
15    question of the right of action under state law becomes  
16    relevant is on the first prong of the mandamus test,  
17    which is whether they have a clear right to the remedy  
18    they seek. That question seems to necessarily bootstrap  
19    in an inquiry of whether state law contemplates a  
20    private citizen being able to bring some kind of claim  
21    and seek the relief that they're asking for. And that,  
22    I think, is where your question is implicated about  
23    whether 163-82.11(c) grants a private right of action.

24          I think you quoted precisely exactly what  
25    the test is. Was the legislature intending to confer a

1 right upon this particular group of individuals? I  
2 think state law also looks to whether the General  
3 Assembly has directed other administrative remedies to  
4 be put in place. And here, consistent with HAVA, the  
5 State Board has been directed to establish an  
6 administrative procedure, which it has done, which  
7 further underscores the fact that Congress seem to  
8 believe that the appropriate remedy and the appropriate  
9 cause of action here was through an administrative route  
10 except, of course, for the Attorney General.

11 So we agree with Your Honor there is no  
12 state cause of action. We just think that that is more  
13 relevant to the question of whether the mandamus claim  
14 can survive, not necessarily a ground for saying that  
15 they couldn't bring a mandamus claim in the first place,  
16 consistent with what Mr. Strach was saying.

17 THE COURT: All right. So mandamus is  
18 proper. The question is "A right to what?"

19 MS. BOYCE: Precisely. Yeah. If you lack a  
20 private right of action, then you're hard-pressed to  
21 establish that first prong, that you have a clear right  
22 to the specific relief that you have requested. That  
23 would be the State Board's position.

24 With respect to laches, just two quick  
25 points there, Your Honor. I still haven't heard any

1 clear representation from my colleagues on the other  
2 side as to when they actually found out about the issues  
3 they're talking about here. I would point out both that  
4 this -- everyone seems to agree that the state form has  
5 existed for decades now. And so to the extent that the  
6 issue arises from a problem with the form, that has --  
7 that has, you know, persisted for many, many more years,  
8 certainly far before June.

9           With respect to the question of when they  
10 realized that the State Board was not going to remove  
11 these voters from the roll or follow up to get more  
12 information, that decision was announced in December of  
13 last year. It was announced in a public meeting. I  
14 would invite the Court to ask my colleagues on the other  
15 side when they learned about that decision, and  
16 specifically whether they had representatives at that  
17 meeting. It is our strong belief that they did.

18           So our position would be that they have  
19 known about this claim since at least December and  
20 should have brought this long before the eve of an  
21 election and now with voting already ongoing.

22           THE COURT: Well, now, this problem persists  
23 past this election, right? So there's the "Can this be  
24 fixed before November?" And there's will this --  
25 elections will continue, and the voter rolls that have

1 people on them who may have problems -- the buckets  
2 issue persists past November. So this is a problem that  
3 remains if to the extent it is -- that otherwise  
4 ineligible voters were registered because the material  
5 was not properly collected, that problem persists. And  
6 the question is how and when that's fixed. That  
7 persists past November.

8           So if we say it's administratively  
9 impractical and would cause people to be removed doesn't  
10 mean you don't have an obligation to fix it potentially,  
11 because there's another election coming after that and  
12 another one coming after that, right? I hope. Right?  
13 We certainly believe that elections will persist.

14           MS. BOYCE: Yes, Your Honor.

15           So, I guess, again, two points in response  
16 to that. First, insofar as the alleged problem was the  
17 form and the problem was that the State Board was  
18 registering voters without making it absolutely crystal  
19 clear on the face of the form that this information was  
20 required if you had it, that has been fixed. That is  
21 not going to occur, moving forward.

22           With respect to the question of whether  
23 there are ineligible voters on the roll and how we deal  
24 with that problem, I just want to take that premise  
25 head-on. We strongly disagree with the notion that what



1 happened here has any chance of resulting in ineligible  
2 voters being on the rolls. We know from HAVA -- and  
3 nothing in state law says otherwise -- that a driver's  
4 license and Social Security are not a prerequisite to  
5 voting. The simple fact that you don't have them does  
6 not mean you're ineligible to vote. Those numbers are  
7 important because they help verify the identity of the  
8 person who submitted a form. And the reason, of course,  
9 that the State Board permits you to check a box saying  
10 that you don't have one and then to submit alternate  
11 supplementary identification is because that also works  
12 as a means of confirming that you're the person who  
13 registered and you're the person who intends to vote.

14           So we just fundamentally disagree that the  
15 failure to provide a driver's license or Social Security  
16 number renders you ineligible. And I think we've talked  
17 at great length in our briefs about the many, many  
18 safeguards that are in place to ensure that no voter  
19 shows up to cast a ballot without providing some form of  
20 verification that they are the person that they say they  
21 are and that they are qualified to vote.

22           Now, of course, North Carolina has two ways  
23 of doing that, both through the requirement of providing  
24 HAVA ID and through our photo ID requirement. But there  
25 is no contention here, and it would be false to suggest

1 that any voter has managed to get on the rolls and then  
2 vote without showing some form of identification, just  
3 as HAVA requires.

4           So to your point, yes, this will continue to  
5 -- people will continue to vote. These people will  
6 continue to be on the rolls. But they will never be  
7 permitted to vote without providing the identification  
8 that HAVA requires under federal law. They will have to  
9 either show a photo identification or a government  
10 identification document. And then once they have done  
11 that, just as HAVA says, they will be permitted to cast  
12 a regular ballot. If they fail to do that, then this  
13 provisional ballot kicks in. But otherwise, federal law  
14 makes quite clear that they are eligible voters who  
15 should be permitted to cast a vote.

16           The only other thing that I wanted to  
17 respond to quickly, if I may, is this new reference to  
18 163-82.4. That has, of course, not been a basis of the  
19 complaint at all. We have been focused on 82.11(c).  
20 But in any event, all 82.4 says is that the form has to  
21 include this information. Doesn't say what happens if  
22 it doesn't. It doesn't say you can't register if they  
23 don't provide it. And so to the extent there was any  
24 issue with that state law, it has been corrected now  
25 that the form does include that information.

1                   THE COURT: All right. Now, Mr. Waxman,  
2 speaking on behalf of the Board, says that there was no  
3 -- that -- at least the Democratic party doesn't concede  
4 a violation. Does the Board agree that -- do you agree  
5 with his position that you don't concede a violation  
6 occurred?

7                   MS. BOYCE: I believe that the way that the  
8 State Board framed it in its order is to concede that it  
9 made it possible a HAVA violation could occur, to have  
10 this form. They agree that the form could be improved.  
11 They agree that the best way to communicate to voters  
12 that this information was important, if they had it, was  
13 to alter the form and change the font. I don't think  
14 that they outright conceded that the form itself was a  
15 HAVA violation. And I think that's in part based on  
16 what Mr. Waxman said about the fact that it seemed to  
17 contradict itself in some ways. It was not highlighted  
18 in red to show that it was mandatory, but it did  
19 nevertheless have an instruction immediately under that  
20 on the face of the form that said, "If you have this  
21 information, you have to provide it."

22                   THE COURT: So the error, to the extent the  
23 error exists, is the failure to place it in red. The  
24 form -- if you --

25                   MS. BOYCE: That's right.

1 THE COURT: -- take the colors away...

2 MS. BOYCE: If you were color-blind -- yes.  
3 You would not -- there would be a different matter.  
4 Perhaps. Perhaps, Your Honor.

5 THE COURT: So the risk of -- the risk of  
6 confusion comes from the absence of the red shading on  
7 those boxes.

8 MS. BOYCE: That's right. Yes. And of  
9 course, Your Honor, this might be a completely different  
10 case if what they were asking for was for us to change  
11 this form.

12 THE COURT: That's already happened.

13 MS. BOYCE: We could fight about that. That  
14 has already happened, though. They could make an  
15 argument that there is a clear right underneath federal  
16 and state law to a form that has this information. We  
17 might disagree with that, but they could certainly argue  
18 that, and maybe it would be a closer question. But that  
19 has already happened, as Your Honor has pointed out.

20 The question here is whether state and  
21 federal law provide them a relief to either kick people  
22 off the rolls or demand that those people cast  
23 provisional ballots instead of regular ones. And that's  
24 simply nowhere to be found in federal or state law. You  
25 can piece things together and, you know, guess that

1 perhaps that is required. But we would argue that that  
2 conflicts with HAVA. And in any event, mandamus  
3 requires it to be a clear duty. If it's ambiguous, then  
4 the mandamus claim automatically fails.

5 THE COURT: All right.

6 MR. STRACH: And, Your Honor, if I may, just  
7 to that point, the point that my colleague just made is  
8 the point. The state courts may very well say, "Yes,  
9 there is a clear right here." So whether you get there  
10 because it's not a substantial federal question and  
11 because it's really a defense to that, or whether you  
12 get there because of something like Pullman abstention,  
13 because these are statutes that the state courts in the  
14 first instance are gonna have to construe and interpret  
15 to say whether there is this clear right or not, it  
16 wouldn't be for this Court to say that, of course. It  
17 would be up to them to say whether that is.

18 That's where we're trying to get.

19 THE COURT: Okay. Now, the abstention  
20 doctrines don't allow me to abstain if there's a 1442  
21 right, correct?

22 MR. STRACH: You mean if there's a right to  
23 removal?

24 THE COURT: Yeah. Under 1442, if they have  
25 a right to removal, then the abstention doctrines don't

1 get me anywhere, right? I've got to remove under that  
2 -- to the extent that statute applies, I have to remove.

3 MR. STRACH: You may be right. I actually  
4 don't know the answer to that off the top of my head.  
5 Mr. Waxman probably does.

6 MR. WAXMAN: I'm gonna help my friend,  
7 Mr. Strach, just by saying the various -- the panoply of  
8 preemption doctrines don't go to the question of federal  
9 jurisdiction or removal of jurisdiction. They go to the  
10 question of is a federal court saying, "Okay. I've got  
11 this case, but one of these abstention doctrines  
12 applies, so I'm just gonna hold onto the case," which is  
13 what happens, "and certify this particular question of  
14 state law to the state court."

15 Now, none of these abstention -- the only  
16 abstention doctrine they've cited is Pullman. And as my  
17 friend on this side of the table said, Pullman  
18 abstention applies only -- only in a case where  
19 abstaining -- getting a state court ruling would avoid a  
20 federal court having to rule on a federal constitutional  
21 question, which is not in this case.

22 THE COURT: Right. It'd be Pullman  
23 adjacent. It'd be avoiding a ruling on a state --

24 MR. WAXMAN: Right.

25 THE COURT: -- constitutional question

1 first. So it would be a different form -- it's not  
2 Pullman abstention qua Pullman abstention, but it's  
3 adjacent. It's avoiding making a state constitutional  
4 ruling as a matter of first --

5 MR. WAXMAN: I mean, there -- it wouldn't be  
6 Pullman abstention. You're right. But a federal court  
7 could say, "My resolution of this federal question  
8 presented to me turns on how the state courts" -- "the  
9 state Supreme Court would interpret this ambiguous state  
10 law." And there's no issue here. I will -- if I can  
11 just beg the Court's indulgence to make, I think, three  
12 points in response to --

13 THE COURT: Well, I was about to ask. I was  
14 gonna say, now, if there's anything you think we've  
15 missed in our conversation, please do. So you have my  
16 indulgence.

17 MR. WAXMAN: Okay.

18 With respect to the removal, remand issue,  
19 the plaintiffs, in their briefing, don't mention  
20 anything whatsoever about supplemental jurisdiction.  
21 And we're not urging removal -- if this case is properly  
22 removed, that any supplemental jurisdiction be exercised  
23 because we think that the 1441 question and the 1433  
24 question apply equally to counts 1 and count 2, as I've  
25 said.

1           But Your Honor did say that, look,  
2       supplemental jurisdiction should be ordinarily entered  
3       narrowly under the -- you know, under the circumstances.  
4       The circumstances here -- if supplemental jurisdiction  
5       were at issue, the circumstances here decidedly point in  
6       the opposite direction. And indeed, I think that  
7       exercising supplemental jurisdiction, if you found that  
8       there wasn't federal removal jurisdiction under count 2,  
9       would be necessary and proper.

10           You know, on my -- there are probably at  
11       least tens of thousands and probably hundreds of  
12       thousands of North Carolina citizens who have already  
13       voted. On my way to the courthouse today from my hotel,  
14       I passed a long line of people waiting to do early  
15       voting in person. And this is a situation that cries  
16       out for an immediate resolution of this issue.

17           Secondly, my friend said, well -- and I  
18       guess this relates to laches -- that, you know, laches  
19       only applies -- the time clock only started running when  
20       there was, quote, a refusal of the State Board to do  
21       what's being asked here.

22           There was such a plain refusal in the  
23       Board's published December order. And, you know, I too  
24       would challenge Mr. Strach to represent here, with  
25       respect to laches, that his client was not actually



1    aware of the complaint filed by Ms. Snow in October and  
2    discussed at a hearing in November.  It's not in the  
3    record in this case.  But it is a public record  
4    susceptible to judicial notice that a representative of  
5    the Republican -- the Republican party of North Carolina  
6    and a representative of the Democratic party of North  
7    Carolina were at that meeting.  So we're talking about a  
8    delay of a year, 11 months, since the Board said, "We  
9    are not providing the additional prospective relief  
10   because we conclude that federal law neither requires  
11   nor allows us to do what it is that Ms. Snow and now the  
12   plaintiffs are saying."

13                   The notion that, "Well, you know,  
14   provisional voting is common in North Carolina,  
15   everybody knows how to do it, and what's the big deal if  
16   these 225,000 people are somehow contacted and they  
17   haven't voted already and told they're gonna have to  
18   vote provisionally" -- provisional voting is absolutely  
19   prohibited to be required under both federal law and  
20   state law to a person who is eligible to vote and  
21   provides the requisite identification that federal and  
22   state law require at the time that she or he votes.  And  
23   that only makes sense because what is it that they're  
24   supposed to cure after they do that?  These people show  
25   up and say, "I'm on the registered rolls."  Or "You just

1 told me that I wasn't somehow on the registered rolls,  
2 but here is my HAVA ID. Here is my photo ID." And  
3 they're told, "No, you have to vote provisionally, and  
4 you've got to cure some question before the" -- you  
5 know, at least the day before the state canvass. The  
6 question is gonna be, "What do I have to do? I mean,  
7 I've already provided both HAVA ID and state-required  
8 photo ID."

9 Now, I can cite Your Honor the provisions  
10 both in federal law and state law that preclude  
11 requiring these people to vote provisionally.

12 The notion that the cited statute -- the  
13 cited state statute in count 1 has, quote, only as  
14 background, a background principle, Section 303 of HAVA,  
15 is -- I mean, it's -- it's breathtaking. The title of  
16 the statute is "Compliance With Federal Law." And the  
17 only thing that -- the only content of the statute is  
18 "You have to do this consistent with HAVA 303."

19 Now, Mr. Strach cited to the Court another  
20 section, 163-82.4(a)(11). I could be wrong, but I don't  
21 believe that that statute was cited anywhere in the  
22 complaint in this case. And in any event, that  
23 provision, which just lists out what has to be on the  
24 form, is entirely derivative of HAVA 303 -- Section  
25 303's requirements.

1           THE COURT: It's not in the complaint. I  
2 looked earlier today.

3           MR. WAXMAN: Okay. So -- phew.

4           On the question of the motion to dismiss,  
5 I'll address first the private right of action, and then  
6 laches and Purcell, which is, I think, the only things  
7 that have been discussed, and then explain why I think  
8 the most fundamental problem here is that the complaint  
9 fails to state -- plausibly allege any federal or state  
10 violation, and that the mandamus sought, either a purge  
11 of all of these people from the voter rolls or a  
12 requirement that they provisionally vote, are absolutely  
13 prohibited by federal and state law.

14           With respect to the private right of action,  
15 I take it that we're arguing only whether there is a  
16 state law, whether state law has some implied private  
17 right of action.

18           THE COURT: Yeah. The case law is against  
19 having any federal -- the Attorney General gets to do it  
20 under federal law.

21           MR. WAXMAN: That's right. I mean, even if  
22 there were some implied -- there were some general  
23 common law rule implying private rights of action or  
24 allowing mandamus, the application of that general rule  
25 to an alleged violation of HAVA -- in essence, an

1   alleged HAVA violation -- would be preempted. I mean,  
2   we're talking here about a federal statute that was --  
3   not only Congress is authorized to promulgate and  
4   require national compliance with, it is actually the  
5   effectuation of a particular constitutional provision in  
6   Article 1 that says that if Congress acts, it shall  
7   dictate the time, place, and manner for holding  
8   elections.

9                   And Congress made the determination that  
10   there is -- that these -- that alleged violations of  
11   this law with respect to registration are to be enforced  
12   either by the Attorney General or in an administrative  
13   proceeding that each state must establish. And neither  
14   of those things is true. And the notion that state law  
15   can then add on a private right of action when --  
16   assuming what we're assuming, for purposes of this case,  
17   that there is no -- it did not provide a federal right  
18   of action to enforce Section 303 or any other provision  
19   of HAVA -- a state rule to the contrary, even if it were  
20   in a state statute, would be preempted.

21                   Now, with respect to -- I think I've said  
22   what there is to be said with respect to laches except  
23   that, in the first place, they have -- they have been on  
24   actual notice about the State Board's declination to  
25   require either of the forms of relief that they are

1 asking for in their complaint and that -- and they also  
2 knew very, very well, as we -- as our own party know  
3 very, very well, the 90-day prohibition on registration  
4 removal.

5 And even if this were, as Mr. Strach says,  
6 "Well, we didn't really know about it until they" -- you  
7 know -- "they ruled on Ms. Snow's complaint in" --  
8 "supplemental complaint in June," both the Supreme Court  
9 and the federal circuit have applied laches in the  
10 election context when the delay has been a matter of  
11 days in the eve of the election, not just a matter of  
12 months, as it was, even under their telling here.

13 I think if laches weren't enough, this is a  
14 manifest case for the application of the Purcell  
15 principle. Purcell basically has cautioned -- and its  
16 progeny -- federal courts not to adjudicate, not to  
17 countenance claims that would disrupt -- in the eve of  
18 an election or near an election -- claims that would  
19 disrupt the established rules of voting, voting  
20 registration, et cetera, et cetera. That's exactly what  
21 this does.

22 And indeed, in a very, very analogous case  
23 in federal court in Arizona, in which there was a --  
24 Maricopa County discovered that there were over 100,000  
25 people who had registered under some prior form, and

1 looking back on it, it really wasn't clear whether that  
2 complied with state or federal law, the Republican party  
3 participated in that litigation, urged the Court under  
4 Purcell and other grounds not to deregister or in any  
5 way burden those particular voters, and succeeded.

6 And that was a -- that was litigation that  
7 was filed, I think -- certainly at least a month ago,  
8 and I think before the 90-day removal period. And so  
9 either Purcell or laches would apply. But I would urge  
10 the Court to dismiss this complaint in the first  
11 instance because it -- you know, number one, it fails to  
12 plausibly allege any violation of federal-state law.  
13 The targeted voters in this case, the 225,000, have  
14 attested under penalty of perjury that they are U.S.  
15 citizens who meet the eligibility requirements to vote.  
16 They're required to do that, and they all did.

17 County Boards of Election have evaluated and  
18 confirmed their eligibility as required by federal and  
19 state law. Those voters who registered by mail are  
20 gonna be required to present -- well, all of these  
21 voters will be required to present both HAVA and photo  
22 ID. And even as of this date, with the election already  
23 ongoing, the plaintiffs have not alleged and are not  
24 prepared to allege that even a single one of these  
25 225,000 voters, contrary to the record in this case, as

1 I've just articulated, is not, in fact, eligible to  
2 vote. I mean, that makes their constitutional claim,  
3 whatever the content of it is, particularly  
4 breathtaking.

5 Secondly, on the merits, granting their  
6 requested relief would violate, as I said, black-letter  
7 federal and state election law. The NVRA prohibits  
8 systematically purging voters within 90 days of a  
9 federal election, and removal from a roll without notice  
10 or an opportunity to be heard and to cure violates both  
11 North Carolina statutory law and the due process clauses  
12 of both the North Carolina and the federal  
13 Constitutions.

14 Their alternate contention that HAVA, you  
15 know, permits only provisional balloting, is refuted  
16 again by both federal and state law. Requiring a  
17 provisional ballot from a voter who is qualified to vote  
18 violates HAVA, which incorporates the NV- -- the Voting  
19 Rights Act. And North Carolina law specifically  
20 provides that there is no provisional balloting required  
21 if an appropriate identification is presented at the  
22 time of voting.

23 And I think that's all --

24 THE COURT: I have a question -- well, I  
25 have a question about what constitutes a properly

1 registered voter. That is, when the person -- if a  
2 person filled out non-HAVA-compliant form, didn't  
3 provide the necessary materials to comply with HAVA, are  
4 they a properly registered voter who's being removed?  
5 Or are they not a properly registered voter in the first  
6 instance?

7 MR. WAXMAN: They are a properly registered  
8 voter if, following an evaluation of the registration  
9 form, the State authorities -- in this case, the State  
10 Board's authority delegated to the County Boards of  
11 Elections -- evaluates it and determines that they are.  
12 And in that instance, state law, you know, absolutely  
13 prohibits their removal except under certain irrelevant,  
14 nonspecified statutory circumstances, like they died,  
15 they moved out of the state, they've become mentally  
16 incompetent, or they've been convicted of a felony and  
17 not reinstated.

18 And I would also, I think, with respect,  
19 quibble with the premise of your question, which is that  
20 they didn't provide the information that is required.  
21 The federal --

22 THE COURT: That's the -- I think that's the  
23 crux of the matter, right? The Republican party here  
24 says, "We don't know, and we want to get the buckets  
25 sorted out so we can figure out who is, in fact,



1 eligible and properly registered."

2 Now, figuring out how to go about sorting  
3 that and remedying it -- and if it's not for this  
4 election because it's too close and we're in Purcell  
5 doesn't mean that we can't have something that fixes it  
6 for the next election where we're nowhere near Purcell  
7 and any, you know, remedy is for the next election, not  
8 this one.

9 MR. WAXMAN: Right. So I -- I guess what I  
10 would say is, first of all, it is their pleading  
11 obligation to at least assert on information and belief  
12 that there are, in fact, voters among the 225,000 they  
13 want to purge that are ineligible.

14 Now, Mr. Strach mentioned a discovery  
15 request that was made to the State Board, and I will  
16 stand corrected if I'm wrong. But my reading of the  
17 discovery request was not "Please identify people on  
18 this" -- "of the 225,000 that are, in fact, ineligible."  
19 It said, "Please tell us what you have done to verify  
20 eligibility."

21 And it is their pleading burden to come  
22 forward and say, "There are ineligible" -- "There are  
23 voters who are going to vote or who are on this list  
24 that are, in fact, ineligible to vote." And HAVA --  
25 neither HAVA nor the state statute that incorporates it

1     require that you provide one of these two numbers. What  
2     the state statute says and the form -- the old form  
3     itself said was "If you don't have either of these two  
4     numbers, you must do the following." And HAVA and state  
5     law provide that somebody who doesn't have either of  
6     these numbers, the State must, A, provide them with a  
7     unique identifier in their registration, assuming  
8     they're determined to be eligible, and require  
9     HAVA-compliant ID when they appear to vote. And the  
10    State has represented in its papers here that it has  
11    done both of those things.

12                 So I don't think that they are improperly  
13    registered, and neither did the county boards that had  
14    the responsibility of ascertaining their eligibility.

15                 THE COURT: Okay. Now, paragraph 68 of the  
16    complaint says, "Upon information and belief,  
17    Defendants' violations of HAVA allowed non-citizens to  
18    register to vote in North Carolina, in direct  
19    contravention of both federal and state law." So they  
20    did make that allegation. And then paragraph 69 says,  
21    "By allowing ineligible voters to register and then  
22    remain on the North Carolina voter rolls, Defendants  
23    have brought the security and validity of the state's  
24    elections into question."

25                 So they have alleged it, right? The

1 question is not have they -- that's their information  
2 and belief. "We think that is true. We want that  
3 bucketed out."

4 MR. WAXMAN: You know, I fully credit my  
5 friend Mr. Strach's professionalism, truly. But if  
6 there -- I would like to know what the information and  
7 belief is that there are people on these rolls who, even  
8 though their eligibility has been examined by the State  
9 Board, and they have sworn under penalty of perjury that  
10 they are, in fact, eligible, what the basis is for  
11 information and belief that -- I guess he's only saying  
12 that they allowed noncitizens to register, not that  
13 there were, in fact, any noncitizens who registered. I  
14 think the predicate is wrong.

15 But my point, I think, still stands, which  
16 is they are coming to this Court and seeking wholesale  
17 relief, on the eve of an election -- well, in the middle  
18 of an election -- without identifying a single  
19 ineligible voter in the face of a state and federal  
20 scheme which makes it essentially impossible for an  
21 ineligible voter to vote because they are all required  
22 to present HAVA ID and, in North Carolina, a photo ID  
23 before they are allowed to vote. I don't understand the  
24 premise under which there could be an argument that  
25 ineligible voters among these 225,000 people are voting.

1 Maybe there's some argument that somebody who did fill  
2 out this -- there's somebody who did fill out this form  
3 with their driver's license number but is not, in fact,  
4 eligible to vote but presents some form of photo ID is  
5 not, in fact, eligible. But it certainly doesn't apply  
6 to these 225,000 who are particularly required to  
7 present HAVA-compliant identification at the time they  
8 vote.

9 THE COURT: All right. I understand the  
10 position.

11 MR. WAXMAN: Okay.

12 THE COURT: I understand the position.

13 MR. WAXMAN: Thank you, Your Honor.

14 THE COURT: Anything that the plaintiffs  
15 wish to bring to the Court?

16 MR. STRACH: Your Honor, very briefly. I  
17 think I've said most of what I need to say.

18 On the question that Your Honor had about  
19 are they registered or not, are they registered and  
20 we're removing them, or were they never registered  
21 before, I would note that if the Board did register  
22 people who did not provide those numbers, then they  
23 would be in violation of HAVA because HAVA says that an  
24 application for voter registration for an election for  
25 federal office may not be accepted or processed by a

1 State unless the application includes the numbers.

2 THE COURT: And that was my -- that was my  
3 understanding when I went through it, trying to figure  
4 out -- so if there's somebody who hasn't presented one  
5 of those -- now, we're sort of at the -- there are three  
6 layers of speculation here, right? One is the  
7 instructions say to give this to us. The colors are  
8 misleading. So does the computer program accept those  
9 registrations that lack those numbers? Are they then  
10 forwarded to the State Board of Election? Are they then  
11 processed and the person is registered in the absence of  
12 the ID or the number? Right? So there are supposed to  
13 be some checks and balances along the way.

14 So when the procedure that Mr. Waxman  
15 describes, where it gets to the County and the County  
16 Board says, "We registered these people," we're making  
17 some assumptions that they have checked to make sure  
18 that the required forms were provided or the required  
19 number is provided. So what we're at the -- we're at  
20 the "We think this is possible, and we don't know, and  
21 this could have gone wrong at each step, and we're  
22 trying to find out." That's reasonable. It's  
23 reasonable to want to find out what actually happened.  
24 That's -- we want to know. Are -- did this person get  
25 through this process without ever providing the

1 HAVA-required materials? And if they did, there's a  
2 question as to whether or not they're a properly  
3 registered voter if they registered -- were accepted by  
4 a functionary in violation of the law, whether or not  
5 they're properly registered in the first instance.

6 So I was reading it, trying to figure that  
7 piece out because whether or not you remove a registered  
8 voter depends on that person being registered. So I  
9 have to figure out what "registered" means in this  
10 context. So I was trying to work my way through that  
11 with all of the materials to figure out who are we  
12 talking about? What's the class? How big is it? How  
13 likely is it we're gonna affect multiple people,  
14 assuming that this case is properly before me, thinking  
15 about how and when we can apply any appropriate remedy?

16 So the question of what constitutes a  
17 registered voter makes a difference in terms of figuring  
18 out what remedy, if any, might even be appropriate. So  
19 that's why I was asking the question.

20 MR. STRACH: Yeah. And we think that's  
21 clearly correct. And that's what the discovery requests  
22 that we propounded were designed to start to figure out,  
23 which is, what are the buckets? What process did people  
24 go through? Did they become improperly registered? And  
25 what's the universe of that look like? That's what the

1     discovery process is designed to do, and that's what  
2     we're trying to do.

3                 And we think that some of these questions,  
4     Your Honor, are, you know, gonna be answered by state  
5     law, and so even less of a reason for this Court to jump  
6     into a fray that's gonna involve a lot of difficult  
7     questions of state law.

8                 MR. WAXMAN: Your Honor, with respect, I  
9     have one and a half points to make in response to my  
10    friend's representations.

11                Number one. In direct answer to your  
12    question, it is not, in fact -- notwithstanding the  
13    language that was quoted -- it is not, in fact, a  
14    federal law requirement that you provide either of these  
15    numbers in order to be registered. Federal law  
16    specifically provides -- and this is 52 U.S. -- well,  
17    this is Section 303(a)(2) -- little "i," I think --  
18    (a)(2)(5) little "i" -- which says that if an applicant  
19    for registration for an election to federal office  
20    doesn't have either of these numbers, the State shall --  
21    it doesn't say that's the ball game. It says, "the  
22    State shall assign the applicant a number which will  
23    serve to identify the applicant for voter registration  
24    purposes."

25                And, in fact, it seems to me that the, you

1 know -- what provides the -- maybe the thirteenth chime  
2 of the clock is a provision of North Carolina law. It's  
3 section 163-166.12(d), which is entitled "Voting When  
4 Identification Numbers Don't Match."

5           This is a situation in which the form is  
6 filled out. One or both of the numbers is provided. It  
7 goes to the responsible state officials for an  
8 ascertainment whether you can or cannot properly  
9 register. And the numbers actually don't match the  
10 government's records. And what this provision says is  
11 that if that happens, you are -- the voter is  
12 nonetheless still entitled to vote provided that he  
13 submits the ballot with the form of identification  
14 described in the previous subsections, which are the  
15 HAVA requirements.

16           And so even when somebody falsely fills out  
17 a -- or mistakenly fills out a number, state law and  
18 federal law require that that voter be allowed to vote  
19 upon provision of HAVA-compliant information.

20           Thank you.

21           (Discussion off the record between defense  
22 counsel.)

23           MR. WAXMAN: Yeah. And only if they fail do  
24 they -- are they required to vote a provisional ballot.

25           THE COURT: Okay. Yes, ma'am.



1 MS. BOYCE: Your Honor, I think it's totally  
2 fair for you to be honing in on the fact that, to some  
3 extent, this can all become quite circular. But I do  
4 think it's important to distinguish between the question  
5 of eligibility and proper registration. Even taking  
6 everything that my colleague over here says as true,  
7 that the State Board should not have processed these  
8 registrations, that would, I think, take us to a  
9 conclusion that they were improperly registered. But it  
10 would not necessarily take us to a conclusion that these  
11 voters are ineligible.

12 THE COURT: I agree. The question is the  
13 purging statutes talk about registered voters. And so  
14 figuring out who we can remove is somebody who is  
15 registered; and to be a registered voter is a separate  
16 question from an eligible voter.

17 MS. BOYCE: I agree with that. The way that  
18 I think about it is that you are registered in North  
19 Carolina if you look up the person in the database and  
20 they appear on the voter rolls. And then North Carolina  
21 is quite clear that you may only be removed from those  
22 rolls if, in fact, certain things are triggered and  
23 essentially it is proven that you are ineligible. And  
24 again, just stepping up -- or, you know, zooming out to  
25 10,000 feet, I do think it matters here that these

1 voters did everything right on the face of the form.  
2 They provided the right information that the form said  
3 was required. They will show up to vote. They will  
4 provide HAVA ID. So Your Honor is faced with a question  
5 of what to do when voters have checked every box that  
6 they have been told they needed to check.

7 THE COURT: We certainly can't be  
8 disenfranchising people who did what they were told to  
9 do who are eligible voters. Right? HAVA is supposed to  
10 help us make sure that only -- that every eligible voter  
11 who wants to register does so in a way that is good and  
12 uniform, and we get there, and we can check them against  
13 our other disenfranchising requirements, and only  
14 eligible registered -- only eligible voters register.

15 So we're supposed to help everyone who can  
16 vote, and should vote, vote.

17 We're also supposed to make sure that people  
18 who can't vote, and shouldn't vote, don't vote, right?

19 MS. BOYCE: Right.

20 THE COURT: We try to figure out the on/off  
21 switch.

22 MS. BOYCE: That's right, Your Honor. But I  
23 do think that the two key points in response to that  
24 are, number one, as my colleague has said, federal law  
25 makes clear that having the driver's license and the

1 Social Security number is not important to that  
2 particular question. You can not have one and you can  
3 still vote. So that's one --

4 THE COURT: Understood. Understood.

5 MS. BOYCE: That's one factor here.

6 And two. I think we all agree that the  
7 purpose here is to force the voter to confirm their  
8 identity. And again, these are voters who will not be  
9 permitted to vote until they confirm their identity in  
10 one of the ways that both state and federal law require.

11 So in that circumstance where the voter has  
12 done nothing wrong, and they're going to jump through  
13 every hoop to provide the information that is actually  
14 absolutely required, you know, we would submit that  
15 there's no question but that federal law -- federal and  
16 state law do not permit those voters to be  
17 disenfranchised, nor does it permit them to be required  
18 to cast a provisional ballot.

19 THE COURT: That was my understanding of the  
20 positions. I think the provisional ballot question was  
21 how do we make sure -- I think that's the outermost ask.  
22 I'm not sure where it's -- where the plaintiffs expected  
23 to land. What they want to do is say, "Can we get  
24 discovery to figure out how big the buckets are? And  
25 when we figure out the bucket of people who shouldn't be

1 allowed to vote, can we figure out where and how we're  
2 gonna stop that?" I think that's ultimately what this  
3 case is about.

4 MR. STRACH: Correct.

5 THE COURT: It's framed as a complaint, way  
6 out here, intended to land at the -- figuring out the  
7 small bucket and keeping the small bucket from voting.  
8 That's how I read it.

9 MR. STRACH: We've been -- we've been moving  
10 in that direction the whole time as best we could.  
11 That's the direction we're heading in. We think that  
12 the Court is right. All eligible voters should vote.  
13 Ineligible voters shouldn't. And that's -- this lawsuit  
14 deals with the second piece of that.

15 And I would just point out real quick, to  
16 one of the points my colleagues made, the -- HAVA and  
17 state laws say that if you don't have driver's license  
18 number or last four, then they have to create a number  
19 for you, that you can be tracked. And then you have to  
20 vote using a HAVA document or a photo ID, whatever.  
21 That's if you were asked and did not have it. We're  
22 talking about people who weren't even asked properly and  
23 may have it and did not provide it. That's a whole  
24 different ball game than what they were just talking  
25 about.

1                   THE COURT: I understand -- I understand  
2 where we are in terms of figuring it out, right? I  
3 don't think the parties fundamentally disagree on we  
4 want eligible voters to vote and we want ineligible  
5 voters to not vote. The question is just how do we get  
6 from where we now stand where there may or may not have  
7 been a problem with the form? I think we're not even  
8 sure we agree on that.

9                   But the form has been fixed to where there's  
10 clearly no problem. How do we get from the possibility  
11 that there are some registered voters who are actually  
12 ineligible voters? How do we find those people if they  
13 exist? And the big ask is "Let's have everybody vote  
14 provisional and we'll sort it on the back end." That's  
15 not practical or, I think, susceptible to a canvass that  
16 works.

17                   So the question is how do we have something  
18 that works inside of that that sorts it? To the extent  
19 that it's doable now at all -- and with Purcell, it may  
20 not be doable for this election. It doesn't mean that  
21 it's not doable prospectively. And so we'll -- I'll  
22 take all of this under advisement. I've got a lot of  
23 thinking and writing to do to decide if this is my case  
24 to decide, and then move from there.

25                   But I'll get something out to the -- I know

1 time is of the essence.

2 All right. Final words.

3 MS. BOYCE: I just have one small point,  
4 Your Honor. And now that it seems like we are all  
5 coalescing around provisional ballots, I just want to  
6 make as crystal clear as I can what I think the dispute  
7 is.

8 The status quo today is that all of these  
9 voters will cast a provisional ballot if they don't show  
10 up and present HAVA ID. That's already the status quo.  
11 All of them will have to do that. What they're asking  
12 for is specifically that these voters be required to  
13 show up and provide a driver's license or a Social  
14 Security number, and if they have HAVA ID, that's not  
15 enough. So I think that really is where we've landed.

16 And our position, of course, is that federal  
17 law makes clear that the HAVA ID should be enough, and  
18 they say, "No, no, no. You actually need to demand that  
19 these people provide a driver's license and Social  
20 Security number if they have one." But I think we have  
21 -- assuming we are now coalescing around provisional  
22 ballots -- which, again, we disagree that, you know --  
23 all the premises that go there. I think that's where we  
24 have landed. And I just wanted to make crystal clear  
25 that we are already in a situation where if you can't

1 provide HAVA ID, you are voting a provisional ballot.  
2 That's the world we already live in now.

3 THE COURT: Right. And I think we're -- I  
4 don't want to get ahead of this case, but time is of the  
5 essence, right? I have to figure out do I own it? If I  
6 own it, what stays here? If I don't own it, what gets  
7 sent back? And then I have to figure out how are we  
8 going to get through whatever discovery is necessary and  
9 appropriate in an expedited fashion given Purcell,  
10 whether or not that's anything that applies to this  
11 election, or we just say we're off the books for this  
12 election, do I retain it, knowing that there's another  
13 election in two years that will be affected by these  
14 same voter rolls and that will give us time to sort that  
15 out? There are questions to think through. I will  
16 think through them as fast as I can, and we will figure  
17 out where we stand with regard to this Court, this suit,  
18 and the next steps.

19 MR. WAXMAN: Can I just provide Your Honor  
20 the citations for -- I stated a -- the broad  
21 proposition that requiring these people to vote  
22 provisionally would be prohibited both by federal law  
23 and state law.

24 First of all, the voting -- requiring a  
25 provisional ballot from a voter who is either, quote,

1 entitled to or, quote, otherwise qualified to vote,  
2 violates the Federal Voting Rights Act. That's  
3 52 U.S.C. 10307(a).

4 Section 163-166.12(e) of the North Carolina  
5 statutes provides that essentially there is no  
6 provisional voting if requisite ID is presented at the  
7 time. And that is also replicated in federal law. It's  
8 52 U.S.C. 21083(b)(2)(B) and 52 U.S.C. 21082(a).

9 And as I said, if we are all coalescing  
10 around the fact that what this lawsuit is about is  
11 keeping -- if there are any -- ineligible voters among  
12 these 225,000 to be able to vote, number one, this --  
13 the request in the mandamus petition, and therefore in  
14 the constitutional argument, is vastly overbroad and  
15 inappropriate. And in any event, we have a mechanism  
16 for doing that, which is the federal and state  
17 requirement that every single one of these voters  
18 provide HAVA-compliant ID and also photo ID at the time  
19 they vote, which is the only thing they would be  
20 required to do if it were not -- if they -- if they were  
21 somehow required to vote provisionally. Thank you.

22 THE COURT: All right. Thank you,  
23 everybody. We'll be in recess.

24 (Proceedings concluded at 11:40 a.m.)  
25



C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/Risa A. Kramer

10/20/2024

Risa A. Kramer, RMR, CRR

Date